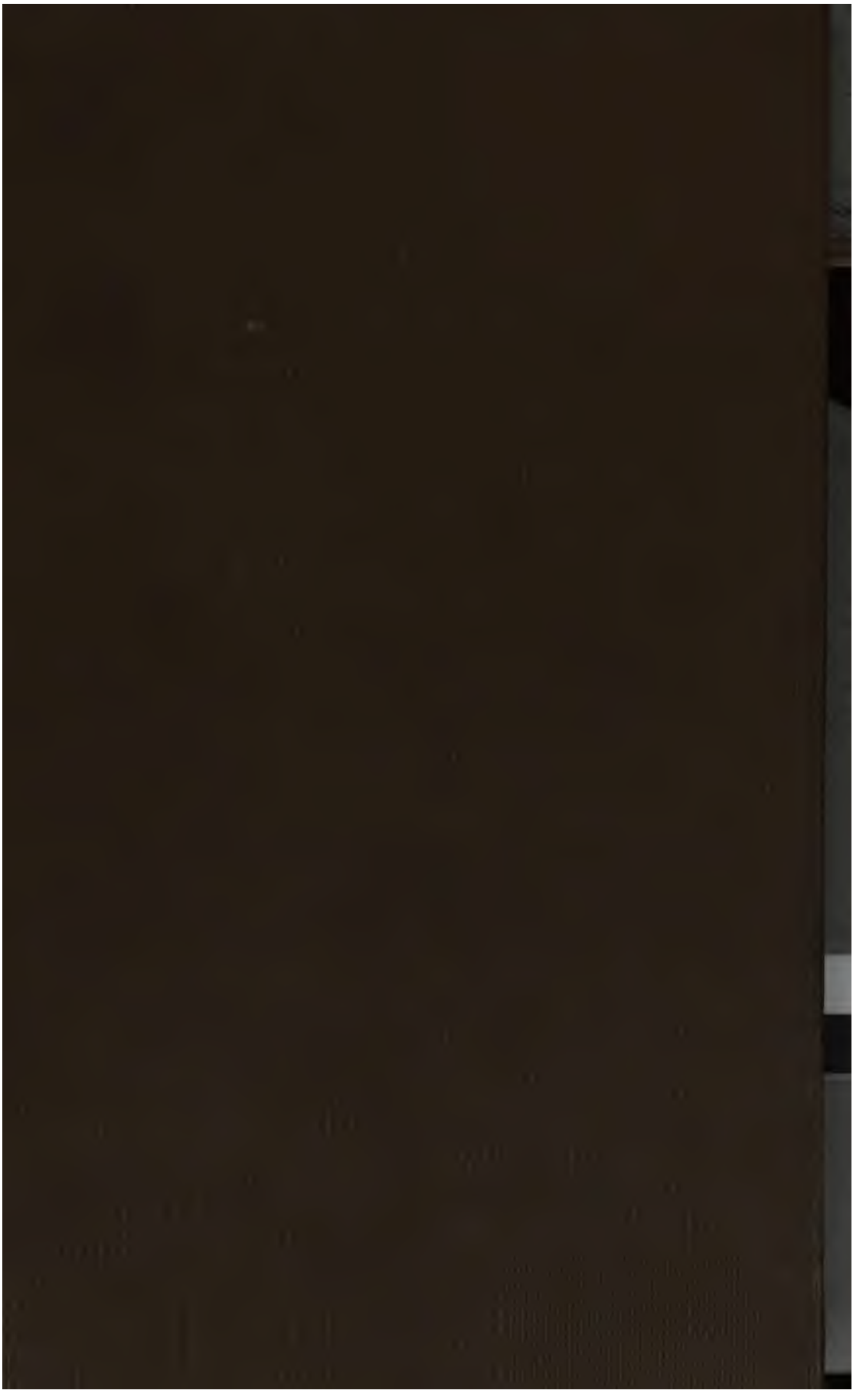

REPORTS

OF

CONTROVERTED ELECTIONS

IN THE

SENATE AND HOUSE OF REPRESENTATIVES

OF THE

COMMONWEALTH OF MASSACHUSETTS

FROM 1853 TO 1885 INCLUSIVE:

TOGETHER WITH THE OPINIONS GIVEN BY THE SUPREME JUDICIAL COURT RELATING TO SUCH ELECTIONS IN THOSE YEARS; — A DIGEST OF DECISIONS OF SAID COURT REGARDING DOMICILE (1 MASS. TO 138 MASS. REPS. INCLUSIVE); — AND THE MESSAGE OF GOV. ANDREW VETOING THE ACT OF 1862 REQUIRING REPRESENTATIVES IN CONGRESS TO BE INHABITANTS OF THE DISTRICTS FROM WHICH THEY ARE ELECTED.

PREPARED AND PUBLISHED UNDER AUTHORITY OF CHAPTER 60 OF THE RESOLVES OF THE LEGISLATURE FOR THE YEAR 1885,

BY

EDWARD P. LORING AND CHAS. THEO. RUSSELL, JR.

C.
BOSTON:
WRIGHT & POTTER PRINTING CO., STATE PRINTERS,
18 POST OFFICE SQUARE.
1886.

Commonwealth of Massachusetts.

CHAPTER 60 OF THE RESOLVES OF THE YEAR 1885.

Resolved, That the President of the Senate and the Speaker of the House of Representatives are authorized and requested to appoint two suitable persons to prepare and publish an edition of the reports of such contested elections of the Legislature, from the year eighteen hundred and fifty-three to the year eighteen hundred and eighty-five inclusive, as may be of value as precedents, with a suitable index thereto.

Resolved, That the persons so appointed shall include in or append to the publication herein authorized all opinions given by the Supreme Judicial Court relating to such elections.

Resolved, That the number of copies of the publication hereby authorized shall not exceed one thousand, and shall be distributed as follows: — One copy shall be furnished to each public library in this Commonwealth; — one copy to each town and city; — twenty-five copies to the State library; — one copy to each member of the Senate and House of Representatives; — and the remainder shall be distributed in such manner as the President of the Senate and the Speaker of the House of Representatives shall determine.

Approved June 8, 1885.

By virtue and in pursuance of the foregoing Resolve, Hon. ALBERT E. PILLSBURY, President of the Senate, and Hon. JOHN Q. A. BRACKETT, Speaker of the House of Representatives, on the seventh day of July, 1885, appointed EDWARD P. LORING of Fitchburg, and CHARLES THEODORE RUSSELL, Jr., of Cambridge, to prepare and publish, as therein required, an edition of the reports of Contested Elections of the Legislature.

PREFACE.

The value as precedents, of the reports of the controverted election cases before the legislature of Massachusetts, was recognized as early as 1811, in which year David Everett of Boston was appointed, by order of the legislature, reporter of such cases. He occupied that position until 1813, and published in 1812, a compilation of cases prior to that year. He was succeeded in 1813, by Theron Metcalf, who occupied the office and published the decisions for four years, when the office was abolished. In 1834, Luther S. Cushing, the clerk of the house of representatives was ordered by the house to prepare, under the direction of its committee, a compilation of the decisions of the house, in cases of controverted elections; and Theron Metcalf of Dedham, Henry W. Kinsman of Boston and Henry Chapman of Greenfield were appointed such committee. This compilation was published in 1834. In 1852, Luther S. Cushing, Charles W. Storey and Lewis Josslyn were appointed, by resolve of the legislature, to prepare and publish a new edition of the election cases previously reported, together with all cases which

had arisen in the house of representatives since that date. This edition was published in 1853, and makes the volume known and cited as "Mass. Cont. Election Cases, Cushing, Storey and Josslyn." Since then, although an unsuccessful attempt was made in 1882, to secure the publication of the more recent election cases, those cases have remained unpublished and inaccessible to the public, until the present publication under the resolve of the legislature of 1885.

The peculiar value of these cases, as precedents, is owing primarily to the high character of the election committees of the two branches of the legislature. Appointed from representatives of different parties, they have brought to their duties, not only ability and learning, but a sense of fairness, — a desire in passing upon cases before them, to act impartially, — and a recognition of the fact that of all the committees of the two houses, the Committee on Elections is, in its work, judicial rather than political — dealing not with contemplated legislation, but with vested rights, and deciding not what should be done in the enactment of law, but what in law and fact the people have done in the exercise of their sovereign right of election. The committees, almost without exception, have been presided over by lawyers of recognized ability, to whom, as a rule, the duty of preparing the reports has been intrusted; and they have performed that duty with the knowledge that their reports necessarily became precedents to guide the legislature in future decisions. In the

next place, one political party, during the period in which the cases here reported arose, has had such a predominating majority in both branches of the legislature, that the temptation to make political decisions in what are mere trials of fact and law, — which has so impaired the value of many reports of election controversies before other more closely divided legislative bodies, — has been entirely absent. The editors, appointed from the two political parties in the Commonwealth, take pleasure in saying, that after careful and conscientious examination of every case reported or unreported, they find little indication in any of them, of partisan bias, or of a desire to do less than perfect justice to all parties upon the law and evidence presented.

The value of these reports of election cases, — not only to succeeding legislatures as precedents for their guidance, — but also to the public officers and citizens of the Commonwealth, in ascertaining their official or personal rights and duties, and to the public at large in aiding the settlement of some of the still open questions in the law of elections, is the justification for their publication.

The editors found the material for their work scattered through the senate and house documents and journals for the last thirty-three years. In most cases the reports were printed, but in some, especially in the earlier cases, we had only the original manuscript of the reports. The material for the work was

gathered from all possible sources; the original papers were in all cases consulted; — and in some cases we had the benefit of the memory and suggestions of the chairman of the committee making the report. In one respect the Resolve of 1885, under which this compilation has been prepared, differs from any previous action of the legislature in providing for the publication of election cases. The resolve directs the editors to publish such cases "as may be of value as precedents." This limitation imposed upon the editors the duty of determining, upon the facts accessible to them, whether each case had been correctly decided by the tribunal in which it arose. In the exercise of this discretion, the editors have reported by reference only, those cases which seemed to deal entirely with facts. A few cases appeared to have been decided upon an incorrect view of the law, and were deemed worthless as precedents. It seemed, however, wiser not to ignore or suppress such cases, as they must continue to exist, and be more or less accessible in the documents of each house,— but to report them as briefly as possible by reference, with a statement of the opinion of the editors as to their value. The greatest embarrassment has been in dealing with those cases where the committees have been overruled. Generally where the committee has been divided, the majority report only is published, — but where the views of the minority have apparently been sustained by the body to which the case was reported, the minority report also is given. In other cases where the views of the

minority have been referred to with approval in subsequent cases, or were in part adopted by the house, — or seem to the editors to have been correct,— they are published with such reference by note as the case seemed to require.

In most of the cases the editors have given the reports *verbatim*, making only occasional changes in phraseology where they seemed necessary. We have, however, for the sake of brevity, in many cases omitted tables of votes and diagrams of rooms, etc., where they were not necessary to a right understanding of the merits of the case. And in some cases we have been able to omit or abridge evidence, which was merely cumulative, and unnecessary in a legal precedent. The district system of representation, adopted in 1857, rendered it impossible, even if otherwise advisable, to refer to the cases by the names of the towns in which they arose, as was done by our predecessors, and we have therefore entitled the cases by the names of the parties to the controversy. That the reports may have all the value of which they are susceptible, we have in all cases stated the names of the members of the committee hearing the case, the name of the member presenting the report, the names of any dissenting members,— and wherever it has been possible, the names of counsel engaged in the case.

We have occasionally added to the report of a case, an editorial note for the purpose of calling attention to the judicial decisions sustaining the

views of the committee, or to authorities opposed to some expression or finding in a report. These notes have been prepared mainly by Mr. RUSSELL, to whom his associate editor desires full credit to be given. Whenever, as in all cases before 1883, statutes have been cited, the editors have added by note or in the text the present citations in the Public Statutes.

The editors have stated after each case the disposition made of it in the branch of the legislature to which it was reported. In doing this, we have followed substantially the language of the Journal of the senate or house, without deeming it our duty to decide whether in every case, the language was in strict compliance with parliamentary form. Whether the case should be disposed of by "resolve" or "resolution;" whether the report of the committee should be "adopted," "agreed to," or "accepted;" and the resolution "adopted," or "passed," seemed to us of little consequence in a work of this kind, so long as the intention of the body was made manifest. In citing the Senate Journal we have used the easily understood abbreviation of S. J.; and in citing the House Journal of H. J. The Senate Journal was first printed in 1868, so that the references to it before that year, are to the manuscript journals in the State Library. The House Journals were printed in 1854, 1855, 1856 and 1857, and again in 1864, and since that year, so that the references to it in other years are also to the manuscript journals.

The resolve of 1885 required the editors to include in, or append to, their edition "all opinions given by the supreme judicial court relating to such elections." In performing this duty, the editors have given a liberal construction to the requirement of the resolve, and have published in the supplement all opinions since 1852, which seem to them pertinent to any question of election law, or of the eligibility of members of the legislature.

In view of the fact that the law of domicile has largely entered into election controversies, in the past, and will undoubtedly enter into them in the future, under the provision of the Constitution requiring the qualification of inhabitancy in members of the legislature, and of residence in voters, — the editors have also prepared and published in the supplement a full digest of all the decisions of the supreme judicial court of Massachusetts upon that subject, — using in the digest of general principles, the exact language of the court as far as possible. The message of Gov. Andrew in 1862, vetoing the Act dividing the Commonwealth into districts for the election of representatives in Congress, because the act required each representative to be an inhabitant of the district from which he was elected, has been deemed by the editors worthy of preservation in a work on election law, and we have taken the liberty of printing it in the supplement.

In preparing the head notes and index, the editors have endeavored to guard against overstatement, striving only to learn the exact point decided, and

then to state it as nearly as possible in the very language of the report. The index, which must also serve as a digest, is made from the head notes, and with a desire to make it as complete and convenient as possible, in the hope that it may be found a ready means of reference to all points decided in the reports.

The editors take pleasure in acknowledging their indebtedness to Hon. ALBERT E. PILLSBURY, not only for the use of his collection of the election cases to 1879, with his valuable notes thereto, but also for suggestions and advice which his familiarity with the reports and knowledge of the law of elections, made of great service to us, and benefit to the publication.

The editors are also under obligation to ROBERT A. SOUTHWORTH, Esq., the efficient assistant clerk of the house of representatives, whose access to, and knowledge of, legislative documents and action have much aided our work. Mr. SOUTHWORTH collected the material for the publication, examined the journals and records to ascertain the disposition of all the cases, and prepared the tables of cases reported and unreported, and the table of cases cited. He has also greatly assisted the editors in the supervision of the printing of the reports.

In conclusion the editors wish to say, that while they have endeavored to prepare what the legislature intended by the resolve, a volume of cases of value as precedents, they are aware that any value it possesses

is owing not to any effort of theirs, but to the able and conscientious work of the chairmen of the election committees, who have been called upon in many cases to guide their committees in the consideration of difficult and novel questions, and have performed their public and judicial duty, not only with the ability apparent in these reports, but in a non-partisan spirit which has made them worthy of preservation in this form.

EDWARD P. LORING.

CHAS. THEO. RUSSELL, JR.

BOSTON, December 28, 1885.

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Some petitioners withdrew, and others failed to prosecute and were given leave to withdraw.

BLANDING ET AL. *v.* PIERCE. House, 1875.
Election of school committee-man. Leave to withdraw given to petitioners.

BROWN *v.* SMITH. Senate, 1872.
Leave to withdraw given to petitioner without any statement of reasons.

BURNHAM *v.* SOWDON. House, 1879.
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COLSON *v.* TABER. House, 1880.
Petitioner failed to prosecute and was given leave to withdraw.

FROTHINGHAM ET AL. *v.* NICHOLS. House, 1853.
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FULLER *v.* ENTWISTLE. House, 1882.
Petition for recount of votes. Leave to withdraw given to petitioner without any statement of reasons.

HOBART *v.* MORRISON. House, 1883.
Leave to withdraw, at request of petitioner, given to petitioner.

HOLLY *v.* MADDEN. House, 1867.
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HOMER *v.* WHITNEY. Senate, 1872.
Leave to withdraw given to petitioner without any statement of reasons.

HUTCHINS *v.* AYER. Senate, 1875.
Leave to withdraw given to petitioner without any statement of reasons.

KIMBALL *v.* KELLY. House, 1879.
Returned member admitted election of Mr. Kimball, and committee so reported.

LANE ET AL. *v.* PROUTY ET AL. Senate, 1853.
Remonstrance was withdrawn by parties.

LEACH *v.* STEVENS. House, 1885.
Petition was withdrawn by petitioner.

MERRIAM ET AL. *v.* FROST. House, 1854.
Case heard and leave to withdraw given to petitioner without any statement of reasons.

NEWELL *v.* DANIELL. House, 1870.
Leave to withdraw given to petitioner without any statement of reasons.

PROUTY *v.* HARWOOD. Senate, 1875.
Leave to withdraw given to petitioner without any statement of reasons.

ROUELL, PET. House, 1880.
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SOULE *v.* ROBBINS. House, 1882.
Leave to withdraw given to petitioner without any statement of reasons.

STEARNS *v.* CHASE. Senate, 1871.
Committee reported that petitioner was entitled to the seat. No reasons stated.

TOWER *v.* DANFORTH. House, 1880.
Petitioner failed to prosecute and was given leave to withdraw.

VAN DUZEN *v.* BRYAN. House, 1879.
Leave to withdraw given to petitioner without any statement of reasons.

WILLIAMS *v.* MARSH. House, 1861.
Leave to withdraw given to petitioner without any statement of reasons.

TABLE OF CASES CITED.

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REPORT OF ELECTION CASES IN MASSACHUSETTS.

1853-1885.

SENATE—1853.

WATTRIS ORDWAY ET AL. *v.* NATHANIEL S. HOWE.

Hon. FRANCIS BRINLEY, Hon. ELISHA MURDOCK and Hon. N. LYMAN STRONG, special committee.

Senate Document, No. 132, April 28, 1853. Report by Messrs. BRINLEY and MURDOCK; — Mr. STRONG dissenting.

Eligibility of Senator. Inhabitancy. To be eligible to election as senator under the constitution, the person must have been an inhabitant of the Commonwealth for the space of five years immediately preceding the election; and the word "inhabitant" in this connection means the same as "resident."

Same. Domicile. Two things must concur to constitute inhabitancy or domicile: *first*, residence, and *second*, the intention to make it a home — the fact and the intent. Residence for however long a time continued will not constitute domicile, unless accompanied with the intention of making it a home, nor will the shortness of time in which the new home is enjoyed, defeat the acquisition of domicile, when accompanied with the intention.

Same. Every person has a domicile; he can have but one at the same time for the same purpose. The place of birth is the domicile, if at the time of birth it is the domicile of his parents. The domicile arising from birth remains until clearly abandoned, and another acquired; and so each successive domicile continues until changed by the acquisition of another.

Same. Evidence. Less evidence is necessary to establish the intention of remaining, where the person returns to his former domicile, than where he is remaining in a new place.

Same. Upon the question whether a person elected senator, Jan. 11, 1853, had been an inhabitant of the Commonwealth for the space of five years immediately preceding the election, it *appeared* that he was born and had lived with his parents in Haverhill, Massachusetts; that after leaving college, he returned there and studied law; after completing his legal studies, he removed to Michigan, where he was admitted to the bar and remained about ten years, visiting, with his wife, his father in Haverhill as often as every other year. In 1847, during one of these visits he expressed an intention of living East, without expressly stating in what place, as soon as he could make arrangements, and inquired about a law office. He then returned with his wife to Michigan, and in the winter of 1847-8, wrote to his relatives of his intention to leave Michigan, and they expected him in Haverhill, without knowing the probable time of his arrival. He sold his real estate in Michigan in January,

1848, and arrived in Haverhill towards the end of May, 1848, with his wife, where he joined his mother's family, and continued to reside with her to the time of election. He rented an office in Haverhill Nov. 28, 1848, and continued to occupy it. It was *held* that on Jan. 11, 1848, he was not an inhabitant of the Commonwealth, and therefore was ineligible to election as senator Jan. 11, 1853.

Same. Law of Foreign Domicile. While for some purposes the states are regarded as *foreign* jurisdictions, the principles of law peculiar to foreign domicile, will not be applied in a question of mere inhabitancy as a qualification for a seat in the Senate under the constitution.

Chas. Theo. Russell for sitting member.

This case arose upon the remonstrance of Wattris Ordway and twenty-seven others, against the right of Nathaniel S. Howe to retain his seat in the Senate, "because said Howe had not at the time of his election, been an inhabitant of this Commonwealth for the full term of five years."

According to the Constitution no person is eligible to the office of senator "who has not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election; and at the time of his election he shall be an inhabitant in the district for which he shall be chosen." — *Constitution of Massachusetts*, c. 1, § 2, *art.* 5.

Another important provision of the Constitution, which must be considered in this connection, is as follows: "And to remove all doubts concerning the meaning of the word *inhabitant*, in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district, or plantation, where he dwelleth or hath his home." — *Chap.* 1, § 2, *art.* 2.

It will be perceived that the language of the remonstrance is not that of the Constitution, and does not set forth the disqualification in unexceptionable terms. But the committee overlooked this inaccuracy of phraseology, and dealing with the remonstrance in a liberal spirit, notified the respective parties that they would be heard. They appeared, and the case has been carefully examined and decided, as early as the pressing engagements of the committee would permit.

The general election of the last year was held on the second Monday of November, the day appointed by the Constitution, it being the eighth day of that month. On examination of the votes for senators for the District of Essex it appeared that no choice had been effected. Among the names of the constitutional candidates reported to the Senate on the seventh of January last, was that of N. S. Howe, who had received 7,390 votes in the District of Essex. On the eleventh of that month, the Senate and House of

Representatives assembled in convention for the purpose of filling the vacancies in the Senate, and the Hon. Nathaniel S. Howe, the sitting member, was duly chosen in convention as one of the senators for said district.

It was in evidence before the committee that Mr. Howe lived with his parents, in Haverhill, from his early youth. Indeed the evidence was satisfactory to the committee that he was born in that town. After leaving college, he returned to Haverhill, and entered his father's office as a student at law. Having completed his legal education, he removed to Michigan, where he was admitted to the bar. He remained there about ten years, during which period he and his wife were in the habit of visiting his father's family in Haverhill, as often as every other year. During his visit in the autumn of 1847, he made the remark that he should prefer living in the East to remaining in Michigan, and that he intended to do so as soon as he could make arrangements. It was not proved that he said he intended to return to Haverhill. During the same visit he made inquiry of one person about a law office. Having completed his visit, he and his wife returned to Michigan. In the winter of 1847–8, he wrote to his relatives of his intention to leave Michigan; and they were expecting him in Haverhill, without being in possession of information of the probable time of his arrival. At length, towards the end of the month of May, 1848, he arrived in Haverhill, with his wife, and immediately became a part of his mother's family, and they continue to be such at this time. On the 28th of November, 1848, Mr. Howe rented an office in Haverhill, and commenced the practice of his profession; he still occupies the same office.

It was proved that on the 29th of January, 1848, Mr. Howe executed a deed of real estate situated in Michigan, in which he is described as "of the county of Hinsdale, and State of Michigan."

It was also in evidence that Mr. Howe's name was not on the tax-book of Haverhill for the year 1848; but it appears on that for 1849.

Such is a brief statement of the facts in the case.

The committee do not attach any great consequence to the circumstance that in the deed alluded to, Mr. Howe is described as of Michigan; nor should they, if it had been proved, as it was not, that the deed had been drafted by him. It is quite common for persons to describe themselves of places other than those of their residence; though it certainly is, in some degree, at variance with a then fixed and settled intent of claiming to be an inhabitant of Haverhill.

In the case of *Horne* v. *Horne*, 9 Iredell's Law Reports, 99, the plaintiff relied much upon the fact that the deceased, whose domicile was in question, in his last visit, had styled himself of "Anson County, North Carolina." But the court held that residence did not constitute a domicile, though it was *prima facie* evidence of it.

So in the case of *Somerville* v. *Somerville*, 5 Vesey's Rep. 789, the Master of the Rolls says that he lays no stress whatever on such a description; that it was totally immaterial how a party described himself.

A not dissimilar view appears to have been entertained by the justice of the supreme judicial court of this Commonwealth, who presided at the trial of the recent case of *Bourne* v. *The City of Boston*.*

Of less importance is the fact that the name of Mr. Howe did not appear on the tax book for 1848. The town clerk of Haverhill, on cross examination, stated, that the number of polls was twelve hundred; that it was not an unusual thing for polls to be omitted by accident; that every year there were persons applying to have their names entered for a poll tax. This is nothing unusual, as is well known to every one familiar with town affairs, and the omission in this case, of itself, is of no great moment. Indeed, it was a perfectly natural circumstance, as Mr. Howe was not in Haverhill on the first of May, but towards the close of that month.

On the 11th of January, 1853, Mr. Howe was elected by joint ballot, a senator from the District of Essex.

Was he an inhabitant of this Commonwealth "for the space of five years immediately preceding his election?" In other words was he an inhabitant of Haverhill on the 11th of January, 1848?

The definition of the word inhabitant, as contained in the Constitution itself, has been already given.

In the third article of the amendments to the Constitution, made

* [NOTE BY THE EDITORS. In the case of *Weld* v. *Boston*, 126 Mass. 166, the court held that, upon the issue whether the plaintiff had his domicile in Boston, as claimed by the defendant, deeds to him as grantee or from him as grantor, in which he was described as of Boston, were admissible against him, — the court saying: — "The deeds of the plaintiff in which he described himself as 'of Boston' were rightly admitted. The recitals in such deeds were admissions by him that he resided in Boston and were competent. For the same reasons the deeds to him in which he was described as of Boston were competent. His acceptance of such deeds without objection was an implied admission of the correctness of the recitals. Though of little weight, the evidence was competent." p. 168. But deeds, letters or other papers in which he is described as resident in another place, claimed by him to be his domicile, are inadmissible in his favor. *Weld* v. *Boston, supra*; *Wright* v. *Boston*, 126 Mass., 161.]

by the Convention in 1820, the qualification of inhabitancy is somewhat differently expressed. The right of voting is conferred on the citizen who has resided within this Commonwealth, and *who has resided* within the town or district, &c. In the opinion of the justices of the supreme judicial court on a question submitted to them by the House of Representatives, and which may be found in 5 Metcalf, 588, and in the Reports of Election Cases in Massachusetts (Cushing, S. & J.) page 510, they say, "we consider these descriptions, though differing in terms, as identical in meaning, and that 'inhabitant' mentioned in the Constitution, and 'one who has resided,' expressed in the amendment, designate the same person. And both of these expressions, as used in the Constitution and amendment, are equivalent to the familiar term domicile, and therefore the right of voting is confined to the place where one has his domicile, his home, or place of abode."

It is conceded that the word *resident* is synonymous with *inhabitant* in the State Constitution. *Williams* v. *Whiting*, 11 Mass. 424.

In this case, the court held that an elector of a representative in Congress must have had his home one full year previous to the election in the town where he would vote. It was an action by the plaintiff, against the selectmen of Dedham, for unlawfully refusing to permit the plaintiff to vote; and the question was, where did the plaintiff dwell or have his home one year next preceding the 2d of November, 1812? On the 28th of October, 1811, the plaintiff was a resident in Roxbury, in the county of Norfolk; just previous to that day, he had been qualified as clerk of the courts for said county. His family remained in Roxbury until the 12th of November of the same year, when he removed to Dedham. From said 28th of October to the said 12th of November, he boarded at a public house in Dedham, that he might be able the more readily to attend to his duties as clerk.

Under these circumstances the court held that he remained an inhabitant of Roxbury until the day of his removal with his family, and that he did not begin to be an inhabitant of Dedham until after the second day of November, 1811, and was not on that day entitled to vote in Dedham, not having been an inhabitant of that town for one year next preceding the election.

In a familiar sense, domicile may be synonymous with residence, home, or dwelling place; indeed, some of the authorities are to the points that residence, inhabitancy or domicile, are substantially the same, and depend upon much the same evidence. The matter of *Thompson*, 1 Wendell, 43. In a purely technical view, however, there is a distinction.

Domicile is of three sorts; domicile by birth, domicile by choice, and domicile by operation of law. The first is the common case of the place of birth, *domicilium originis;* the second is that which is voluntarily acquired by a party, *proprio marte.* The last is consequential, as that of the wife arising from marriage. *Story on Conflict of Laws*, sect. 49.

The case of *Thorndike* v. *The City of Boston*, establishes the points: that every man must have a domicile somewhere; that he can have but one for the same purpose, at the same time; that an existing domicile continues until another is acquired; and that by acquiring a new domicile, a former one is relinquished.

In this case the court say: "The questions of residence, inhabitancy, or domicile — for, although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence — are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim — that every man must have a domicile somewhere, and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another; and, *vice versa*, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur, that the evidence of facts tending to establish the domicile in one place would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another. So on the contrary very slight circumstances may fix one's domicile, if not controlled by more conclusive facts, fixing it in another place. If a seaman, without family or property sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not, by some actual residence or other means acquire a domicile elsewhere, he retains his domicile of origin." *Thorndike* v. *City of Boston*, 1 Metcalf, 242.

The question — what place is any person's domicile or place of abode, is a question of fact. It is, in most cases, easily determined by a few decisive facts; but cases may be readily conceived, where the circumstances, tending to fix the domicile, are so nearly balanced, that a slight circumstance will turn the scale. In some cases, where the facts show a more or less frequent or continued residence in

two places, either of which would be conclusively considered the person's place of domicile, but for the circumstances attending the other, the intent of the party to consider the one or the other his domicile will determine it. One rule is, that the facts and intent must concur. Certain maxims on this subject we consider to be well settled, which afford some aid in ascertaining one's domicile. These are, that every person has a domicile somewhere, and no person can have more than one domicile at the same time, for one and the same purpose. It follows from these maxims, that a man retains his domicile of origin till he changes it, by acquiring another; and so each successive domicile continues until changed by acquiring another. And it is equally obvious, that the acquisition of a new domicile does, at the same instant, terminate the preceding one. *Opinion of Justices of Supreme Judicial Court*, 5 Metcalf, 587.

In the case of *McDaniel* v. *King*, 5 Cushing, 469, the question was, whether Leavitt, one of the insolvents, was a resident of the Commonwealth within one year next preceding the date of the petition of the creditors. The court say, "the question of residence or domicile is one of fact, and often a very difficult one — not because the principle on which it depends is not very clear, but on account of the infinite variety of circumstances bearing upon it, scarcely any one of which can be considered as a decisive test. The principle seems to be well settled — that every person must have a domicile, and that he can have but one domicile for one purpose at the same time; it follows, of course, that he retains one until he acquires another, *eo instanti*, and by that act he loses his next previous one. *Abington* v. *N. Bridgewater*, 23 Pick. 170. The actual change of one's residence, and the taking up of a residence elsewhere without any intention of returning, is one strong indication of change of domicile. *Thorndike* v. *Boston*, 1 Met. 242. The actual removal of one, from another State to this, leaving a family therein, but with no intention of returning, is a change of domicile. *Cambridge* vs. *Charlestown*, 13 Mass. 501.

The court held that it was clear under the evidence, that Leavitt left New Hampshire, where he had been in business, without any intention of returning, and he acquired a domicile in Massachusetts.

Another well established rule is, that every case must depend upon all the circumstances connected with it, and be determined by them.

"Actual residence, that is, personal presence in a place, is one circumstance to determine the domicile, or the fact of being an inhabitant, but it is far from being conclusive. A seaman on a long voyage, and a soldier in actual service, may be respectively inhabi-

tants of a place, though not personally present there for years. It depends, therefore, upon many other considerations, besides actual presence. When an old resident and inhabitant, having a domicile from his birth in a particular place goes to another place or country, the great question, whether he has changed his domicile, or whether he has ceased to be an inhabitant of one place and become an inhabitant of another, will depend mainly upon the question to be determined from all the circumstances, whether the new residence is temporary or permanent — whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object, or whether it is for the purpose of continued residence and abode, until some new resolution be taken to remove. If the departure from one's fixed and settled abode is, for a purpose, in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties." *Sears* v. *Boston*, 1 Metcalf, 250.

"This case," say the court, "is distinguishable from that of *Thorndike* v. *Boston*, in this: that in that case, at the time of the departure of the plaintiff from Boston, it was his declared intention not to return and resume his residence. A person being at a place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence. It may be rebutted no doubt. A person travelling; on a visit; he may be there some time on account of his health or his business, &c. *Marsh* v. *Hutchinson*, 2 Bos. and Pul. 230, in note.

The place of birth of a person is considered as his domicile, if it is at the time of his birth, the domicile of his parents. This is the domicile of birth or nativity, and it is said to be lost with difficulty and recovered with ease. *Catlin* v. *Gladding*, 4 Mason, 308.

Thus, according to Chancellor Kent, "the circumstances requisite to establish the domicile are flexible and easily accommodated to the real truth and equity of the case. Thus it requires fewer circumstances to constitute domicile in the case of a native subject who returns to reassume his original character than it does to impress the national character on a stranger. The *quo animo* is, in each case, the real subject of inquiry; and when the residence exists freely without force or restraint, it is usually held to be complete, whether it be an actual or only an implied residence. 1 *Kent's Com.* 84.

If a man has acquired a new domicile different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reacquired, even while he is on his way, *in itinere*, for it reverts from the moment the other is given up. *Story on Conflict of Laws*, sect. 48. *The Francis*, 1 Gal. 614. *The Indian Chief*, 3 Rob. 12.

A national character, acquired in a foreign country by residence, changes when the party has left the country *animo non revertendi*, and is on his return to the country where he had his antecedent domicile; and especially if he be *in intinere* to his native country with that intent, his native domicile revives, while he is yet *in transitu*, for the native domicile easily reverts. The moment a foreign domicile is abandoned, the native domicile is reacquired. *Ibid.*, sect. 48.

Notwithstanding the importance given to the *intent* or *animus* of the party — a mere intention to remove, unaccompanied by any act towards carrying the intent into effect, is not sufficient.

To prove a change of domicile it must be made to appear not only that the old domicile had been abandoned, but also that a new one has been acquired, so that a domicile being once fixed will continue, notwithstanding the absence of the party, until there is a substitution for a new one. The intention to abandon, and actual residence at another place, if not accompanied with the intention of remaining there permanently, or at least for an indefinite time, will not produce a change of domicile. *Jennison* v. *Hapgood*, 10 Pick. 77. *Somerville* v. *Somerville*, 5 Ves. 756.

It has been decided in Alabama, that an intention to change the domicile, without an actual removal, with the intention of remaining, does not cause a loss of the domicile.

This was held in the case of *The State* v. *Hallett*, 8 Alabama Reports, new series, 159. The defendant was indicted, found guilty, and fined for voting at a presidential election, without being legally qualified to vote. It appeared, that the defendant was a citizen of Georgia, up to September, 1843; about that time, being in Alabama, he declared his intention to settle in the State, if he could procure a particular site for an iron foundry. Between the first and fifteenth of September, he leased the site for five years. Soon after he commenced operations, and left for the purpose of bringing his family from Georgia. He did not reach Alabama with his family until the 26th of November, 1843. He established his family in Talladega County, continued to reside there, and on the 11th of November, 1844, voted at the presidential election. He took legal advice as to his right to vote, which was in favor of the

right. On this evidence he was found guilty, and the case was certified to the supreme court of the State.

The court say, "the mere intention to change the domicile, without an actual removal, with the intention of remaining, does not cause a loss of the domicile.

"Here the facts were, that the defendant, being domiciled in Georgia, came to this State, with the design of settling here, and manifested his intention of making this State his permanent residence, by leasing a piece of land, procuring materials for the erection of a foundry, and going to Georgia, to bring his family. These acts all mark, unequivocally, his intention to change his residence from Georgia to this State. These facts, however, are not sufficient to cause a loss of the domicile he previously had. If, on his return to Georgia, he had died before being able to carry his purpose into effect, it can admit of no doubt, the courts of Georgia, and not of this State, would have been entitled to distribute his estate. The same rule must have prevailed, if he had died upon the journey here, because until he had actually reached here, there would have been no change in fact, of the domicile.

"In one case, indeed, the *intention* to remove, has the effect to change the domicile, where one, by residence, has acquired a domicile, different from that of his birth, and with intention to resume his former domicile, sets out on his return. In that case, it has been held, that the domicile is reacquired from the time he manifests such intention, (*The Venus*, 8 Cranch, 253.) This proceeds from the fact, that the acquired domicile was adventitious, and may therefore be thrown off at pleasure."

It is proper to add, that Judge Goldthwaite dissented.

The case of *Cambridge* v. *Charlestown*, 13 Mass. 501, involved the question of the settlement of a pauper by the name of Raymond; the family resided in Vermont, but the husband had resided ten years in Charlestown, in this Commonwealth; the court held, that though he had a family in Vermont, and occasionally visited them, it made no difference, and that he was chargeable to Charlestown, because he did not consider Vermont as his home, but kept his family there only until he could conveniently remove them. "In the meantime he was permitted to exercise all the privileges, and was subject to all the duties of an inhabitant of Charlestown. Had his family resided on a farm belonging to him, *in another town within the Commonwealth*, there might be some question respecting his domicile."

A mere intention to remove has never been held sufficient, without some overt act; being merely an intention, residing

secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. . . . . Something more than mere verbal declaration, some solid fact, showing that the party is in the act of withdrawing, has always been held necessary in such cases. *The President*, 5 Robinson, 277.

In the matter of *Wrigley*, 8 Wendell, 134, it appeared that he obtained a discharge from the Recorder of New York as an insolvent debtor, and the question arose, whether he was an inhabitant of New York at the time of presenting his petition. The court say, "although the plaintiff in error was an inhabitant of New York while he was actually located there and doing business as a commission merchant, yet the moment he broke up his residence and sailed for his native land, *sine animo revertendi* he was no longer an inhabitant of New York, but he resumed his domicile of origin."

It may therefore be laid down as a general rule, in all questions with regard to domicile, the chief point to be considered is the *animus manendi;* if there be no intention of making a fixed and permanent abode in a foreign country, even a protracted residence there will not change the domicile; as, e g., where the accomplishment of a temporary purpose is the chief object of the stay; while, on the other hand, even the shortest residence, if with a design of a permanent settlement, stamps the party so residing with the national character. If the intention to establish a permanent residence be once ascertained, the recency of the establishment, though it may have been for a day only, is immaterial.

The point, then, to be ascertained being the real *intention* of the *party himself*, no circumstance can be regarded as unimportant which can in any way tend to throw light upon it, and the amount of evidence required to establish an *animum manendi*, must, of course, vary with the circumstances of the particular case.

Thus, upon the plainest principles of good sense, slighter evidence would be required to make out an *animum manendi* in the case of a man returning to his own country, than in the case of the same man going to reside in a foreign land. In the former case there is a natural presumption that the party is returning to resume his original character; in the other the natural presumption rather is, that he is not going for the purpose of making his home in the foreign country, but rather of returning thence to his own, when he shall have accomplished the object of his journey. Hence a national character, acquired in a foreign country by residence, changes immediately the party has left such country *animo non revertendi;* and this is especially the case if he have left the

foreign to return to his native country, *sine animo revertendi.* In such cases the native domicile revives, while he is yet *in transitu*, for it very easily reverts, and is reacquired the moment the foreign domicile is abandoned — 1 *Arnould on Insurance*, 98–99.

Mere declarations of an intention to remove ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies these declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish *The Venus*, 8 Cranch, 253.

Nothing but an actual removal, or a *bona fide* beginning to remove, can change a national character, acquired by domicile. *Ibid.*, at page 283.

Some of the principles to be extracted from this review of these various cases (to which the committee would have referred by citation only, had the argument been addressed to a court instead of resorting to this popular form of discussion), are these: That every person has a domicile: that he can have but one, at the same time, for the same purpose; that the place of birth is the domicile, if it is at the time of the birth the domicile of the parents; that the domicile of origin, which arises from birth and connections, remains until clearly abandoned, and another taken, which proposition is more fully considered in *Andrews* v. *Herio'*, 4 Cowen, 516, in note, and *Plumner* v. *Brandon*, 5 Iredell's Reports in Equity, 190; that the domicile of birth is easily reacquired; and that two things must concur to constitute a domicile: first, residence, and second, the intention to make a home — the fact and the intent; that residence for however long a time it may be continued, cannot constitute a domicile without the intention of permanently making it a home, nor can the shortness of time in which the new home is enjoyed, defeat the original acquisition, when accompanied with the intention, for in the latter there would be the *factum et animus;* for which, see also, *Home* v. *Home*, 9 Iredell's Law Reports, 99–108; *The Ann Green.* 1 Gal. 274.

The committee consider it to be established in this case that Mr. Howe's domicile of origin was Haverhill; that he abandoned it years ago, and acquired a domicile in Michigan; that while in Haverhill, in 1847, he expressed a preference for the East, and

indicated to a few individuals an intention to leave Michigan when he could make his arrangements; but it was not in proof that he avowed an intention to return to Haverhill, though his relatives seemed to have expected it. He made no movement in furtherance of that intention until the execution of his deed of his real estate in Michigan, on the 29th of January, 1848, even if that circumstance can be so construed; his being in Michigan, at that time was *prima facie* evidence that he was there domiciled; the great overt act indicating an intention to reacquire a domicile in Massachusetts, was his arrival in Haverhill towards the close of May, 1848, which was not five years immediately prior to his election to the Senate by the votes of the convention of the two branches of the legislature.

But in order to admit the application of the principles of law in regard to foreign domicile to this case, it will be necessary to concede that the cases arising under international law are in point and of binding authority, in a question of mere inhabitancy as a qualification for a seat in the Senate, as defined in our Constitution.

To accomplish this, it has been argued that the States of this Union are to be considered as *foreign* jurisdictions, and that therefore the law as to foreign domicile is applicable and conclusive in this particular case. This proposition the committee do not admit to be well sustained. It is undoubtedly true our courts have decided that judgments rendered in the tribunals of the sister States are *foreign* judgments. *Hitchcock* v. *Aicken*, 1 Caines, 400; *Bartlett* v. *Knight*, 1 Mass. 430.

So, too, bills of exchange drawn in one State upon another State are considered as foreign. *Duncan* v. *Course*, 1 South Carolina Constitutional Reports, 100; *Buckner* v. *Finley and Van Lear*, 2 Peters, 586; *Phœnix Bank* v. *Hussey*, 12 Pick. 483.

So too the laws of other States of the Union are considered as foreign. *Haven* v. *Foster*, 9 Pick. 112.

For all national purposes embraced by the Federal Constitution the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign to, and independent of, each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. *Buckner* v. *Finley and Van Lear*, 2 Peters, 586.

So far as these States are subject to the laws of the Union, they are not foreign to each other. But so far as they are subject to their own respective state laws and government, they are foreign to each other. *Opinion of Mr. Justice Thompson*, 5 Peters, page 57.

In Virginia it was held, that in cases of contracts, the laws of a

foreign country where the contract was made, must govern; and the court added, "the same principle applies, though with no greater force, to the different States of America; for though they form a confederated government, yet the several States retain their individual sovereignties, and with respect to their municipal regulations, are to each other foreign. *Warder* v. *Arrell*, 2 Wash. 298.

All this may be conceded, and yet it will not follow that this is a question between a foreign domicile and a domicile of origin, or, if it were, that it is to be decided by international law and not by the *Constitution*. The courts, for certain purposes, do sometimes, and to a limited extent, admit the applicability of international law; but it is for commercial and not political purposes that the citizens of one State are sometimes considered as of a foreign jurisdiction. In the opinion of the committee, the language of the court in the case of *The Inhabitants of Jefferson* v. *The Inhabitants of Washington*, 19 Maine Reports, 293, as to the propriety of invoking the aid of the principles of international law, is extremely pertinent. This was a case involving a question under the State laws, as to the legal settlement of a pauper. The court say, "the counsel for the defendants in error, in his argument, treats the words dwelling-place and home as if synonymous with domicile, and proceeds to argue, that one domicile continues until another is gained; and that to have a domicile a man need not have any particular place of dwelling, or for his home; and he cites numerous authorities to support his position. But the answer to them all is, that domicile, though in familiar language used very properly to signify a man's dwelling-house, has in cases arising under international law, and in kindred cases thereto, a sort of technical meaning. And the authorities cited all apply to it in this sense. It fixes the character of the individual, in reference to certain rights, duties and obligations; but dwelling-place and home have a more limited, precise and local application.

When the legislature speak of dwelling-place and home, as being requisite to establish the *settlement* of paupers, it cannot mean to use these terms in a vague and indeterminate sense. Something specific was in contemplation. It was intended to define, so that it could not be misunderstood, and so that it should be obvious to the common sense of every man, what should constitute a settlement. Constructive dwelling-places and homes, if there be any such, could not have been in contemplation. If a man actually has a home or dwelling-place, all his fellow townsmen can at once see and know it; but as to constructive dwelling-places and homes, who can tell what they are, or where they are to be found, or to

which of the senses they can be made obvious. In the case of *Turner* v. *Buckfield*, 3 Greenl. 229, it is expressly decided, that the words dwelling-house and home meant some permanent abode or residence, with intention to remain."

This argument applies directly to the point involved in the present instance. The word inhabitant is precisely defined in the Constitution itself; to wander in the paths of international law in pursuit of devices for evading the force of constitutional requisitions cannot be reconciled to the dictates of legislative duty. The result would be the substituting of a constructive dwelling-place or home, for that real, permanent, substantial and visible place of abode which is contemplated by the Constitution.

The proof is that Mr. Howe did not arrive in Haverhill until May, 1848; now to maintain that he had his home and dwelling-place in that town, for months previous, by construction, is a course of argument which, however ingenious, cannot be sustained in the very teeth of the Constitution. The committee would gladly have come to a different conclusion. Mr. Howe has proved himself to be an active, industrious, and most acceptable senator. Dignified and courteous to all, the committee believe that there is not a member of the Senate who entertains for him any feelings but those of very sincere regard. To lose his services, and to miss his presence, even for the short remainder of the session, will be to his associates a subject of regret. But this must be met and endured, if need be. After most anxious deliberation, the committee are of opinion that the Hon. Nathaniel S. Howe, one of the sitting members from the District of Essex, had not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election, and at that time was not constitutionally eligible to the Senate. They therefore declare his seat to be vacant.

[The views of the minority, finding that, upon the evidence, Mr. Howe had resided in the Commonwealth for five years immediately preceding his election, were presented by Mr. Strong. The report of the committee was indefinitely postponed. S. J. 1853, p. 601. The report of the majority is published by the editors as correct in its findings, and valuable as a precedent.] *

* [A previous remonstrance against the eligibility of Mr. Howe was made by Eben H. Safford *et al.*, and was subsequently withdrawn by the remonstrants.]

HOUSE — COMMITTEE ON ELECTIONS, 1853.

Messrs. W. R. P. WASHBURN of Boston, *Chairman;* JOHN G. THURSTON of Lancaster, WILLIAM O. CURTIS of Lenox, JAMES D. GREEN of Cambridge, NAHUM PERKINS of North Bridgewater, STEPHEN B. IVES of Salem, and EDWIN BAXTER of Barnstable.

AMOS HAWS ET ALS. *v.* JOSEPH S. DARLING.

House Document, No. 78. March 4, 1853. Report by W. R. P. WASHBURN, *Chairman.*

Notice of Meeting for Election. — Where it was the usage to give fourteen days' notice of a town meeting, — if such notice was rendered impossible by the fact that the meeting for the election of representative was required by Article 10 of the amendments to the Constitution to be held on the second Monday in November, and failing an election, to be adjourned to the next day, and then, failing an election, another meeting was to be held on the fourth Monday in November, — it was *held* that eleven days' notice, being all the notice possible, was sufficient.

Motion not to Elect. — A motion made and laid on the table of the selectmen, at a town meeting, that the town do not proceed to the choice of a representative at this meeting, may be considered as waived, if subsequent motions are, without objection, made and acted upon, and the former motion is not renewed, or in any way called up, or made the subject of remark.

The Committee on Elections, to whom was referred the remonstrance of Amos Haws and others, against the right of Joseph S. Darling to a seat in this House from the town of Leominster, have considered the subject, and submit the following report: It appears that a town meeting was held in Leominster, on the second Monday of November, and by adjournment on the day following, but no choice of a representative having been made, the meeting was dissolved, and another meeting was called and held on the fourth Monday of the same November.

The first objection to Mr. Darling's right to a seat is that the warrant for calling the meeting, was dated only eleven days prior to the day of his election; whereas, the usage in Leominster has been to give fourteen days' notice of town meetings, for the choice of representatives, as well as for other purposes.

By Article 10 of the amendments to the Constitution, town meetings are to be held on the second Monday of November, and may be adjourned, if necessary, for the choice of representatives, to the next day, and again to the next succeeding day. And in case a second meeting shall be necessary, it shall be held on the fourth Monday of the same November.

In this case there is no pretence that all the notice was not given which could be given, after the ineffectual attempt to elect on the second Monday of November, and the day following; and it is apparent that fourteen days' notice could not be given, after the adjournment of the meeting held on the day succeeding the second Monday of November, of a meeting to be held on the fourth Monday of the same November.

If, then, the town of Leominster, or any other town, in which a representative is not chosen at the first meeting, and in which there is a usage to give fourteen days' notice of the meetings of the town, can avail themselves of the right to elect on the fourth Monday by virtue of the amendment to the Constitution providing therefor, this objection ought not to prevail.

The second objection is that a motion in writing was made and laid on the table of the selectmen, "that the town do not proceed to the choice of a representative at this meeting," which was not put, and that thereby the voters were deprived of the exercise of their right to determine whether they would or not be represented in this House.

On this subject your committee have heard the testimony of several witnesses, and are of opinion that the selectmen considered this motion as waived, by reason of others which were subsequently made, put and acted upon, or that if not strictly superseded by the subsequent motions which were to dissolve the meeting, the fact that it was not renewed or in any way called up, or made the subject of remark, after such proceedings, must be taken as evidence that the result of the other motions was acquiesced in, and that no one should now be allowed to complain of that to which he made no objection at the time.

Your committee are unanimously of opinion that neither of the objections should deprive the member from Leominster of his seat, and that said petitioners have leave to withdraw.

[The report of the committee was accepted. H. J. 1853, p. 484.]

In re Martin J. Steere.

Newell A. Thompson of Boston, James Small of Truro, James D. Colt, 2d, of Pittsfield, Moses B. Greene of Amherst, and Eli Thayer of Worcester, special committee.

House Document, No. 196. May 19, 1853. Report by Messrs. Thompson, Small, Colt and Greene, Mr. Thayer, — dissenting.

Eligibility of representative. Removal of residence. Under the third article of section three, chapter one of the Constitution, a representative who has ceased to be an inhabitant of the town he represents, thereby vacates his seat.

Same. What constitutes removal of residence. Where a representative, who was at the time of election a minister settled in Blackstone, from which town he was elected, accepted, after taking his seat, a call to a church in Somersworth, New Hampshire, agreeing to commence his services as pastor the following April, and to preach himself or supply the pulpit there from that date — preaching there the first Sunday in April, from which date his salary commenced, — having dissolved his pastoral relations in Blackstone in March, and leased his house there to his successor, and hired a house in Somersworth to which he subsequently removed his household furniture and personal effects, — remaining himself with his wife and one of his children in temporary quarters in Boston, spending part of his time in Somersworth and other places, intending to make his home in Somersworth as soon as the legislature adjourned, although wishing to do nothing to affect his right to retain his seat as representative, — and with that desire stipulating that he was not to assume his pastoral duties in Somersworth, beyond supplying the pulpit, until the legislature adjourned,— it was *held* that he had ceased to be an inhabitant of Blackstone, and his seat should be declared vacated.

The committee appointed under an order of the House of the 15th inst., to inquire and report "whether or not the Rev. Martin J. Steere, representative from Blackstone, is any longer entitled to a seat upon this floor, under the provisions of the third article of the third section of the first chapter of the Constitution of this Commonwealth," having considered the subject matter referred to them, beg leave to submit the following report.

The article of the Constitution referred to in the order under which your committee was appointed, read as follows: —

"III. Every member of the house of representatives shall be chosen by written votes; and for one year at least next preceding his election shall have been an inhabitant of the town he shall be chosen to represent; *and he shall cease to represent the said town immediately on his ceasing to be qualified as aforesaid;* and no possession of a freehold or of any other estate shall be required as a qualification for holding a seat in the house of representatives."

Thus it appears that but one single qualification only is requisite to render a person an eligible candidate for a seat in this House, to wit, that of being an inhabitant of the town he is to represent, for

one year at least next preceding an election, and being thus *eligible* as a candidate, he must be elected by *written votes* to entitle him to a seat; and the words in the Constitution, "*and he shall cease to represent the said town immediately on his ceasing to be qualified as aforesaid*," must be construed as referring to the single qualification of inhabitancy only, and therefore, whenever the representative ceases to possess this single qualification of inhabitancy, he must, under this provision of the Constitution, vacate his seat; and the question now to be determined is, whether Mr. Steere's case comes within this provision.

It is admitted that at the time of his election in November last, he was, and had been for one year at least previously, an inhabitant of Blackstone, and that he was elected as a representative from that town by the written votes of his constituents. But it appeared in evidence before the committee, and was admitted by Mr. Steere himself, that sometime in March last, being then the pastor of a Baptist Society in Blackstone, he received an invitation to change his pastoral relations and take charge of a similar society in the village of Great Falls, at Somersworth, New Hampshire; that he accepted this invitation, and entered into an agreement with the last named society to commence his services with them on the first of April, stipulating to preach himself, or to supply the pulpit, from that date, and actually preaching there himself on the first Sabbath in April, his stated salary commencing from that date. That in pursuance of this arrangement, he dissolved his pastoral relations with the society in Blackstone in March, taking leave of them at that time by a formal discourse, such as is usually denominated under such circumstances, "*a farewell sermon*," leased the house he then occupied there to his successor in the ministry, or for his use; hired a house in Somersworth, to which he subsequently removed all his household furniture and personal effects, where the same now are arranged in order for housekeeping. Since that time Mr. Steere himself has occupied temporary rooms in Boston, his wife and one of his children being with him a portion of the time, and a portion of the time at Somersworth and elsewhere, and he has preached several Sabbaths at Great Falls since the first of April. That when he left Blackstone, he did so with the full intention of not again returning there to reside, but with a determination to make Somersworth his permanent residence, and to go there directly from Boston as soon as the legislature should adjourn.

It further appeared in evidence before the committee, that the selectmen and board of assessors at Blackstone had stricken the name of Mr. Steere from the list of resident tax-payers prior to

the first of May, and that he was not assessed in that town for his poll tax and personal estate on the first day of May, and would not be so assessed.

Under these circumstances, your committee are of opinion that Mr. Steere, having left Blackstone on or about the first of April last, with the intention of taking up his residence in another State, which intention is made fully manifest by various other subsequent acts of his, then ceased to be an inhabitant of that town, within the true intent and meaning of the provisions of the Constitution herein before referred to.

Having thus lost his residence in Blackstone, the question arises, whether he has become an inhabitant of the city of Boston, where he now occupies temporary lodgings, or whether he has actually gained a residence in Somersworth. And in this connection your committee would remark, that Mr. Steere stated to them, that, in his stipulations with the committee of the society at Great Falls, it was verbally understood between that committee and himself, that he was not to enter upon his parochial duties, beyond that of supplying their pulpit, until after the adjournment of this legislature, and that he did not wish to do anything which would deprive him of the right to retain his seat in this house; and your committee with great pleasure accord to Mr. Steere the best of motives in regard to this matter, believing, as they do, that he fully believed the course he was taking as to his change of residence to be one which he could lawfully pursue, and still be entitled to a seat on this floor. But this desire on his part, and verbal understanding between him and his employers in New Hampshire, cannot be considered as destroying, or at all controlling the legal effect of the many *acts* actually done by him, constituting in themselves a change of residence; nor do they afford sufficient ground upon which he may properly base a claim to be an inhabitant of the city of Boston, where he now has temporary lodgings. For if the declaration of a party alone were to be taken in such a case, without regard to his actions in the premises, it is obvious that the provisions of the Constitution now under consideration would be wholly unnecessary and ineffectual, and no representative could ever be unseated on account of his "ceasing to be an inhabitant of the town he was chosen to represent;" for although he might perform all those acts which in themselves constitute a change of residence, he would only have to declare his intention to consider himself a citizen of Boston until the legislature rises, to secure his seat in the House, notwithstanding he may have actually removed from the State, or from the country even, and be thereby wholly beyond the reach of the laws he is assisting to enact.

To this doctrine your committee cannot assent; but they are of the opinion that Mr. Steere, having by his own acts ceased to be an inhabitant of Blackstone, as before mentioned, has not acquired a residence in this city, but is merely here for a temporary purpose; and that having removed his furniture and personal effects to Somersworth, New Hampshire, and connected himself with a religious society there, as their pastor, and having already actually commenced his clerical duties by preaching there himself, or procuring others to preach for him, in pursuance of an agreement entered into between himself and the said society, he has thus acquired a legal residence in Somersworth, to all intents and purposes, and is therefore no longer a citizen of Massachusetts.

Your committee do not deem it necessary to go into any extended argument to substantiate the position they have taken in this case, but beg leave to refer the House to a case of similar character, in which precisely the same principles are involved and fully discussed, to wit, the case of Henry H. Baker, returned a member of the House of Representatives in the year 1851 from Georgetown.—*Reports of Election Cases in Massachusetts*, Cushing, S. J., page 599, &c.

Taking the decision of that case as a precedent, a majority of the committee have no hesitation in reporting that, in their judgment, the Reverend Martin J. Steere is no longer entitled to a seat on this floor as a representative from the town of Blackstone. *

[The resolve that the seat was vacated reported by the majority of the committee was ordered to a third reading under a suspension of the rules, and later both reports and the resolve were laid on the table, and no further action appears to have been taken. H. J., 1853, pp. 929, 947, 956. The report of the majority is published by the editors as a valuable precedent.]

* [Note by the Editors. This case arose under the former provisions of the Constitution of the Commonwealth, (Art. III. sect. 3, ch. 1), that every member of the House of Representatives shall have been for one year at least next preceding his election an inhabitant of the town he shall be chosen to represent, and shall cease to represent said town immediately on his ceasing to be qualified as aforesaid. Under this provision, as construed by the committee, a representative ceased to be qualified to retain his seat, when, after taking it, he removed from the town he was chosen to represent. Since the report of the committee, this provision was amended in 1857 (Art. XXI. of the Amendments), by substituting the provision that "every representative, for one year at least next preceding his election shall have been an inhabitant of the district for which he is chosen, and shall cease to represent said district when he shall cease to be an inhabitant of the Commonwealth." Under this provision, the removal of a representative from the district for which he was chosen to another place in the Commonwealth will not disqualify him to retain his seat. To vacate the seat, the removal must be to some place out of the Commonwealth.]

HOUSE — COMMITTEE ON ELECTIONS, 1854.

Messrs. HENRY W. KINSMAN of Newburyport, *Chairman;* STEPHEN B. IVES of Salem, BENJAMIN EVANS of Freetown, J. OTIS WILLIAMS of Boston, PETER P. HOWE of Southborough, THADDEUS B. BIGELOW of Cambridge, WILLIAM WARNER of Sheffield.

C. B. PENNIMAN ET ALS. *v.* PARLEY J. PRINDLE.

House, unprinted. March 18, 1854. Report by HENRY W. KINSMAN, *Chairman.*

[In this case the remonstrants claimed that the sitting member, returned as elected in the town of Williamstown, was not entitled to the seat, on the ground that the warrant of the selectmen of the town calling the meeting for the general election of the year, directed that the votes for governor, lieutenant-governor and senators should be on one ballot, but did not direct that the votes for representative should be on the same ballot. It appeared in evidence that a number of the votes for the sitting member for representative, — sufficient, if thrown out, to change the result, — were written on the ballot for governor, lieutenant-governor and senators, and so deposited in the ballot-box, and were counted for him. The committee apparently considered the fact, if proved, to be immaterial to the validity of the election, and reported that the remonstrants have leave to withdraw. The report was accepted by the House. H. J., 1854, p. 622. C. B. PENNIMAN represented the remonstrants, and ANDREW J. WATERMAN the sitting member.]

HOUSE — COMMITTEE ON ELECTIONS, 1856.

Messrs. LUTHER J. FLETCHER of Lowell, SAMUEL O. LAMB of Greenfield, JONATHAN E. MORRILL of Fall River, CHARLES J. TAYLOR of Great Barrington, JOSHUA C. HOWES of Dennis, JOSEPH LUNT of Newbury, and JOHN F. FENNO of North Chelsea.

WARREN LYNDE ET ALS., PETITIONERS.

House Document, No. 29. January 26, 1856. Report by L. J. FLETCHER *Chairman.*

Order of Action upon Warrant for Meeting. — Where the second article in the warrant for a town meeting was, "to bring in their votes for a representative to the general court on a separate ticket," — the town can act upon such article, before disposing of the first article in the warrant.

Same. — A motion to send, or not to send, a representative, is equivalent to a motion to take up the second article in the warrant.

Motion not to send a Representative. — A motion not to send a representative, properly made and fairly adopted, will be binding upon the town.

The Committee on Elections, to whom was referred the petition of Warren Lynde and others, of Melrose, in relation to the town meeting of said town, holden November 6, 1855, have considered the same, and report that they have carefully considered all the matters set forth in said petition, and have given to the parties interested a hearing in relation thereto.

From the statements of the petitioners, and from facts which were given in testimony at the hearing aforesaid, it appears, that said town meeting was legally warned, and was called to order at the proper time, and by the proper town officer. That immediately after the meeting was called to order the town clerk read the warrant, and then, before any other business was transacted, a motion was made to the effect, that the town should send a representative to the next general court.

This motion had reference to the second article in the warrant for said meeting, said article reading as follows, to wit: — "To bring in their votes for a representative to the general court, on a separate ticket."

Said motion *to send* was not seconded, and immediately after a motion was made *not to send*, which motion was seconded and put to vote, when a large majority of the voters present sustained the motion, and the chairman declared that it was a vote *not to send.*

A motion was then made to reconsider said vote, and, during the pendency of said motion, three gentlemen spoke upon the question, and all the discussion was allowed upon the same, which any voter then present offered, or requested to have.

The meeting refused to reconsider said vote, by a large majority of those present, and from the testimony of both petitioners and respondents, the committee are satisfied that said majority, which then and there voted *not to send*, and refused to reconsider said vote, were also a majority of all those who voted at said town meeting during that day.

It appears that after this question had been decided, and before said town meeting closed, several legal voters tendered to the chairman of said meeting, their votes for Levi Martin, as representative, and claimed that they should be received and counted. Said votes were not received, counted, or declared, and it was not made to appear to the committee that more than five such votes for representative were offered to be cast.

The petitioners claim that the vote *not to send* a representative, was invalid, inasmuch as such a vote could not be taken until the first article in the warrant had been disposed of; and, as a number of votes were offered for Levi Martin, for representative, and none for any other person, for that office, they therefore ask that this honorable House shall take such action in reference to the election of said Levi Martin, and his right to a seat, as shall be deemed just and proper.

The committee are unanimous in the opinion, that, after the warrant for said meeting had been read, the town had a right to act first upon the second article in said warrant, if they so chose; and that a motion to send a representative, or a motion not to send a representative, was equivalent to a motion to take up the second article in the warrant.

They are satisfied that the motion not to send was properly made, that ample time was allowed for the consideration and discussion of the same, and that the decision then had was a fair expression of the wishes of the legal voters of that town.

As there were no votes received, counted or declared in said town meeting, for the said Levi Martin, the committee must decide that there was no election of the said Martin, and, consequently, nothing in the request of the said petitioners upon which they are called to decide.

The committee recommend that the petitioners have leave to withdraw.

[The report of the committee was accepted. H. J. 1856, p. 174.]

EDWARD W. HINKS ET AL. *v.* JUSTIN JONES ET AL.

House document, No. 64. February 18, 1856. Report by Messrs. FLETCHER, MORRILL, HOWES, TAYLOR and LUNT, — Messrs. LAMB and FENNO, dissenting.

Issues open upon the Petition. Practice — At the general election in which 44 representatives were to be elected from Boston on one ballot, the representative whose seat was controverted, Jones,— was elected with 42 others, the two next highest, Hinks and Cornell, having the same number of votes, so that there was no choice of the 44th member. At a subseqnent election to fill the vacancy, another person, one Conley, was elected. In a petition by Hinks and Cornell against Jones and Conley, it was claimed that Jones was ineligible, so that both petitioners were elected at the general election, and Conley's subsequent election was void. It was *held* that Jones could not introduce evidence that there were informalities or illegal proceedings in certain wards at the general election, rendering the election in those wards void, and thereby so changing the result that other persons than the petitioners would be the next highest candidates to those returned as elected, as Jones's right could not be affected by such evidence.

Eligibility of Representative. Inhabitancy. Upon the issue whether the returned member had been an inhabitant of Boston for one year previous to the election, November 6, 1855, so as to be eligible to election, it *appeared* that he had lived in his own house in Cambridge for some years previous to 1854, doing business in Boston, and continued to reside there until August 14, 1854, when he commenced boarding at the Quincy House, Boston, leaving his furniture in his house in Cambridge, and continued to board at the Quincy House, paying by the day, for a month. His family in the meantime visited in the country. During his stay at the Quincy House and at other times, he tried to find a house in Boston, and expressed an intention of moving there, if he could succeed, and not to return to Cambridge if he could help it. In September his family returned to the house in Cambridge and he joined them there, continuing to live there until March or April 1855, when he removed to Boston. It was *held* that he was not a resident of Boston for one year next preceding his election, and was ineligible.

Votes for ineligible Candidate. Votes cast for a person found ineligible by reason of non-residence, cannot, in the absence of proof that they were cast with knowledge of the ineligibility and with an intention on the part of the voters to throw away their votes, be regarded as blanks, so as to entitle the candidate receiving the next highest number of votes to the seat.

Charles Thompson for petitioners.
Warren Tilton for sitting members.

The Committee on Elections, to whom was referred the petition of Edward W. Hinks and William M. Cornell, in relation to the right of Justin Jones and Charles C. Conley, members returned from Boston, to a seat in this House, and claiming themselves to have been elected, have considered the same, and report that they have patiently heard and carefully considered all the evidence offered by the petitioners in support of their petition, and all the evidence offered by the respondents which could in any way affect their interests as members of this body.

Both petitioners and respondents were represented by learned counsel, and the committee have cause to believe that all the facts, material to a correct view of this case, were made to appear.

In regard to those facts, there is little, if any difference of opinion in the minds of the committee; but upon some points of law applying to those facts, and upon some conclusions to be drawn from them, they are not so happily agreed.

There are principles involved in this case, different, in some respects, from those to be found in any election case to which we have been able to refer as a precedent, and upon some points the decisions appear conflicting; but, guided in our investigations by the highest authorities we have been able to consult, we have, upon the facts hereinafter stated, arrived at the subjoined decisions.

It appears from the records of the city of Boston, that, at the State election on the 6th day of November last, Justin Jones received five thousand three hundred and thirty-three votes for representative from said city of Boston to this general court; and that said votes were the requisite number to secure his election.

It also appears that forty-two other representatives were elected, and that Edward W. Hinks and William M. Cornell received the next highest, and the same number of votes. Boston being entitled to but forty-four representatives, there appeared to be one vacancy, and only one; and, as said Hinks and Cornell had an equal number of votes, neither of them could claim an election to the exclusion of the other.

Another election was had in Boston on the 26th of said November, for the choice of one representative, at which election Charles C. Conley received one thousand seven hundred and seventy-four votes, and was declared elected.

Said Conley and Jones, with forty-two others, received their credentials as representatives from the city of Boston, and were admitted to seats in this House.

But the petitioners, in their said petition, allege that the said Justin Jones was ineligible, as a representative from Boston, at the time of said election, on the 6th of November last, he not having resided in Boston for the term of one year next previous to that date.

[The report here contains, at some length, the testimony of the witnesses examined by both parties upon the question of Jones' residence, — and then continues.]

At this stage, in the hearing of this case, the attorney for the respondents proposed introducing testimony to show that there were informalities, or illegal proceedings in the election in wards *one* and *five*, in the city of Boston, on the 6th of November last, so great as to render void the election in said wards; which fact, if shown, would materially change the result in the plurality of votes

claimed by the petitioners, and show, that in case the respondents are not entitled to seats in this House, then some other persons, and not Messrs. Hinks and Cornell, are the next highest candidates, and might claim their rights as such.

The counsel for the petitioners objected to the introduction of such testimony, and the chairman of the committee decided that it ought not to be put in.

On this decision the committee were not agreed, and the attorney for the respondents filed in the case the following request, to wit: "In case of any other report, except leave for the petitioners to withdraw, the respondents in this case respectfully ask, that the ruling of the committee on this point should be reported to the House."

In compliance with this request, the ruling of the chairman is here given, which, having been put in writing at the time it was made, was agreed to, and signed by a majority of the committee. It was in substance as follows, to wit: —

Ruled, That if, as alleged in the petition of Edward W. Hinks and William M. Cornell, Justin Jones was ineligible as a representative from Boston on the 6th of November last, and if the votes given for him at the election on that day are to be considered as blanks, then, as it is not denied by either petitioners or respondents, that the election on that day in all the wards of Boston, except wards one and five, was valid, and the returns, as made, correct, it follows, in that case, that two other persons were elected, and those, the two who had the next highest number of the votes legally cast and returned.

Under such circumstances, Mr. Jones, who could not be entitled to his seat, because of ineligibility, could not, upon his rights as respondent in this case, put in testimony to show that the election in some of the wards was invalid and void, as that could in no way affect his right to a seat in this House.

Neither could Mr. Conley, under the propositions aforesaid, put in such testimony, unless he claims that at the election on the said 6th of November, he was a candidate on one of the representative tickets in Boston, and also claims that by throwing out the returns from wards one and five in said Boston, either or both, he should have been one of those two next highest candidates aforesaid, and, consequently, elected; for if, as aforesaid, Jones is ineligible, and the votes cast for him are to be treated as blanks, then two other men were elected, and if Conley was not one of them, that ends his case as respondent here, and the proposed testimony could in no way affect his claims as a member of this body.

Again; if, as before, we say that Jones is ineligible, but say

that the votes cast for him should be counted, then there was but one vacancy which the mayor and aldermen of Boston had power to act upon, and the election of the 26th of November was rightfully called, and Mr. Conley, having a plurality of votes cast on that day, would be entitled to his seat.

With this view of the case, as the testimony proposed could not in any way affect the interests of the parties desiring to introduce it, we believe and decide that it should not be allowed in this investigation.

After this ruling, the respondents signified their intention to rest the case here, and the committee, after listening to the arguments of the learned attorneys on both sides, proceeded to consider the authorities cited and to compare them with the facts in this case.

As the first question to be considered was whether or not Justin Jones was eligible to a seat in this House, as a representative from Boston, the committee proceeded at once to an examination of all the facts that had been adduced in testimony, and of all the authorities that had been cited, as bearing in any way upon this point.

They find, that, to have been an eligible candidate for representative from Boston, at the last State election, he must have been an inhabitant of Boston for one year next previous to the 6th day of November last. This is a qualification required by the Constitution of the Commonwealth, and the question is, had said Jones this qualification?

He had lived in East Cambridge, in his own house, for several years previous to 1854. During 1854 he continued to reside there until August 14, when we find him commencing to board at the Quincy House, in Boston. We have it in evidence that he boarded there one month, and some say they think he was there two months or more, but, in the minds of the committee, the time is very clearly fixed as being from the 14th of August to the 14th of September; for Mr. Burdagin, of East Cambridge, said that his account with Jones for provisions was all regular as usual, with the exception of from August 10 to September 14, during the whole of that year.

If the last, in August, which Burdagin charged to Jones, was on the 10th of that month, and Jones went to the Quincy House to board on the 14th, how is it that the charges commenced again on the 14th of September, unless the family of Jones returned on or before that day? And is it probable that Jones would have remained at the Quincy House after his family had returned to his house in East Cambridge? We think not.

We are fully satisfied, that, with the exception of a single month,

Jones resided in East Cambridge during the whole of 1854, and until the month of March or April, of 1855.

Mr. Burdagin, who furnished his family with provisions, is confident of this. Mr. Slocumb, who was his neighbor, and lived nearly opposite, on the same street, is sure that his family resided there until the March or April aforesaid; and of this, too, Mr. Tufts was quite as confident.

We are then to ask, as our next inquiry, what effect, if any, the residence or stay of Mr. Jones at the Quincy House, from August 14 to September 14, had in changing his domicile from East Cambridge to Boston?

His house, his furniture, and his last domicile were at East Cambridge. His family had just gone from there, as it appears, to visit for a time in the country. Jones tries to find a house in Boston during his stay at the Quincy House, and tells one of his men that if he can succeed, "he shall, on the return of his family, move directly to Boston." "That he shall not go back to East Cambridge, if he can help it." Did this desire of his to live in Boston, coupled with the fact of his stay at the Quincy House; did this conditional intention to move into Boston, coupled with the fact of his boarding there for one month, — make him a resident of Boston — an inhabitant of that city within the meaning of that word, as used in the Constitution?

The supreme judicial court of this Commonwealth has decided some few points that will aid us in our decision of these questions.

First. "The word '*inhabitant*,' in the Constitution, is equivalent to the idea conveyed by the word domicile." — 5 *Met. Rep.*, 588.

Second. "Every man must have a domicile somewhere." — 5 *Met. Rep.*, 589.

Third. "The loss of a former domicile and the acquisition of a new one are simultaneous." — *Ib.*

Now, if Mr. Jones acquired a domicile at the Quincy House, he lost his domicile at Cambridge — he could not have one in both places at the same time.

Did he lose his domicile at Cambridge, while his furniture remained there in his own house, and while he was undecided whether or not he should go back there to live?

The committee think not.

In the Georgetown case it was decided that a man's domicile is "that place where he is voluntarily situated, with the intent to remain permanently."

Now, although it may be said that Jones was voluntarily situated in Boston, can it be said that he intended to remain perma-

nently there; or did that intention depend on the contingency of getting a suitable house? The testimony of Mr. Beckett settles this question, for he said, that Mr. Jones told him he should not go back to Cambridge to live, *if* he could get a suitable house in Boston. That was certainly equivalent to saying that he should go back, if he could not find a house; and then the fact of his going back, which was conclusively shown, confirms the committee in their belief that he never had a fixed intent to remain permanently in Boston, during his stay at the Quincy House. His intent depended upon an uncertainty. His desire to remain in Boston was wedded to as strong a fear that he should not be able to remain.

He could not, under those circumstances, have gained a domicile in Boston, by boarding there a single month.

The Georgetown case, Contested Election Reports (Cushing, S. & J.), page 599, cited by the respondents, as tending to show that Jones gained a domicile in Boston, in 1854, is not a case having a single parallel with the one under consideration.

That was the case of a clergyman whose pastoral relations to his society were almost sufficient, without any other considerations, to determine his domicile.

He had left his former place of residence, closed his connection with the society there, and never expected to act as their pastor again.

He had commenced preaching in Georgetown, and had no occupation in any other place. He was engaged positively as their preacher and pastor for four months, and as the people seemed united on him, and had voted to break off a partial engagement with another preacher, who had been preaching as a candidate for some time previously, he had every reason to suppose that he should remain there permanently. And he did remain. It is true that he did not move his family to Georgetown till some time after he commenced preaching there, but while he spent a portion of his time with them in Essex, his pastoral relations, duties, responsibilities, expectations and home were all in Georgetown.

We fail to see the case of Mr. Jones in the Georgetown case, but think its parallel is to be found in the case of Elijah Pratt, of Webster, Contested Election Reports (Cushing S. & J.), 526. And that the decision of the committee in that case applies in all respects to the case of Mr. Jones.

The committee, in their decision in that case, say, as follows: No man loses an old and acquires a new residence, until his intention of changing his residence ceases to be in suspense and becomes fixed.

If the removal depends on any contingency or doubt, the residence is not changed till the contingency ceases. The removal of Mr. Jones to Boston did depend on a contingency, and a contingency so great as to amount to an effectual barrier for the time being, and to oblige him to reside in East Cambridge for months after he left the Quincy House.

The committee also rely on the decisions in the case of *Jennison* v. *Hapgood*, 10 Pick. Rep. 77; and in *Abington* v. *North Bridgewater*, 23 Pick. Rep. 170; and in accordance with those and other established precedents, they fail to see how the said Jones, by any act shown to have been done by him, or by any desire or wish shown to have been cherished by him could have lost his domicile in Cambridge, or have gained one at Boston, until he moved there in March or April, of 1855.

They are therefore of the opinion that Justin Jones, one of the sitting members of this house, from the city of Boston, was ineligible at the time of his election, on the 6th of November last, he not having been an inhabitant of the city of Boston for one year previous to his election — and that he is not entitled to a seat in this house.

The only important question which now remains for the committee to decide is the following, to wit: Should the votes cast for Mr. Jones be counted as such, or should they be treated as blanks? Upon the decision of this question depends so much of this case as relates to Charles C. Conley. If the votes for Jones should be treated as blanks, then there were two vacancies, which would, by implication of the plurality law, have been filled by the next two highest candidates, at the election on the 6th of November last.

Mr. Conley was not one of those next highest candidates, and if we decided to call the votes for Jones so many blanks, then, as the first election would have been complete, the second would be void, and Mr. Conley would be unseated.

But the committee are of opinion that the votes cast for said Jones should not be treated as blanks. The five thousand three hundred and thirty-three voters, who voted for Justin Jones, are presumed, in the absence of all testimony to the contrary, to have voted in good faith. They evidently did not intend to throw away their votes, and if not, we believe that their intent should be respected, and that they should have an opportunity of correcting their error, and of making another choice.

The cases that have been cited as precedents to govern in this decision do not seem to apply with much force, as they are all

cases where votes were supposed to have been thrown by mistake, or intentionally thrown for a candidate known to be ineligible.

This was the fact in the Somerset case, Contested Election Reports (Cushing, S. & J.), p. 576, and the committee there say, that "there is no reason why a person who votes for an ineligible candidate should not be put upon the same footing with one who does not vote at all, as in both cases the parties show a disposition to prevent an election." This decision was clearly on the ground that the parties knew they were voting for ineligible candidates; and that reasoning cannot apply in this case.

The same is true in the Attleboro' case, Contested Election Reports (Cushing, S. and J.), p. 254, and of the case of *Wilkes* and *Luttrell*, in England; the voters knew they were voting for ineligible candidates.

In view of this difference between the cases cited, and the one under consideration, and in view, also, of a report made by the majority of a committee of the House of Representatives in 1843, in which report the said majority of that committee say that "no votes should be rejected from the count simply on account of the ineligibility of the candidates voted for,"—your committee are unanimously of opinion that the votes for Justin Jones should be counted as such, and that consequently, the election of Mr. Conley was valid, and that he is entitled to his seat.

[A minority report was made by Messrs. *Lamb* and *Fenno*, in which they found that, upon the evidence, Mr. Jones had resided in Boston for one year next preceding his election, and was therefore eligible. Upon presentation of the reports, the House accepted the report of the majority (H. J., 1856, p. 416). The acceptance was afterwards reconsidered, and a motion to substitute the minority for the majority report was, after debate, lost by a vote of 97 yeas to 136 nays (H. J., p. 428). The majority report was afterwards accepted by a vote of 156 to 111 (H. J., p. 478), and later was again reconsidered, under a suspension of the rules, and recommitted to the committee (H. J., pp. 481, 492, 493, 494). The committee again considered the case, and a majority, Messrs. *Fletcher*, *Howes*, *Lunt and Morrill* made another elaborate report, dated April 24, 1856, affirming their previous report that Mr. Jones had not resided in Boston the period required to render him eligible for election. A minority of the committee, Messrs. *Lamb*, *Taylor* and *Fenno* reported that the evidence failed to prove his ineligibility. The reports are in House documents for 1856, No. 224.

Upon presentation of these reports, they were laid upon the table (H. J., p. 1118), and no further action appears to have been taken. The editors publish the first report of the majority, as in their opinion correct, and valuable as a precedent.]

JOSEPH DAY *v.* CHARLES A. TAFT.

House Document, No. 143, March 29, 1856. Report by all the Committee.

[In this case the election of the sitting member, returned by a plurality of one vote, was controverted on the ground that votes for the opposing candidate were offered and illegally refused; that a vote for the sitting member by a person without the required qualification of residence, was received and counted; and that some persons were allowed to vote for State officers in sealed envelopes, and for representative by open ballots, thereby having an opportunity for double voting. The report of the committee deals entirely with questions of fact, and finds that the allegations of the remonstrant were not sustained by the evidence. As the case involved no question of law, it is not of value as a precedent.]

HOUSE—COMMITTEE ON ELECTIONS, 1858.

MARCUS MORTON, JR., of Andover, *Chairman;* DANA HOLDEN of Billerica, JAMES BENNETT of Leominster, RICHARD S. SPOFFORD, JR., of Newburyport, EDWARD H. R. RUGGLES of Dorchester, CHESTER GOODALE of Egremont, and JOHN LOVEJOY of Lynn.

SYLVANDER JOHNSON *v.* LANSING J. COLE.

House document, No. 20. January 28, 1858. Report by MARCUS MORTON, JR., *Chairman.*

Irregularities in Returns do not affect Election. An election will not be invalidated merely on account of subsequent neglect or irregularity on the part of election officers in making up the returns, if the will of the voters legally expressed can be ascertained with certainty.

Same. The provisions of the Act of 1857, ch. 311, § 5 (substantially the same as Pub. Sts. ch. 8, § 8), regarding the mode of recording the result of the election, and making and sealing up in open town meeting a true transcript of the record of the result, and delivering the same to the clerk, are ***directory***, rather than ***mandatory***, and not conditions upon which the right of the voters to be represented depends.

Same. So, the opening by the town clerk of the envelope sealed in open town meeting, and exhibiting the transcript to a selectman of another town in the district and then resealing it, — making the record and transcript after the adjournment of the town meeting instead of in open town meeting, — making up the record after adjournment of town meeting, and carrying to the meeting of the clerks, on the following day, an attested copy not signed by the selectmen or sealed up, — making up the record on the second day after the town meeting, and then drawing up a statement of the votes for representatives, signed by a majority of the selectmen and by the clerk, sealed up and delivered to the clerk in open town meeting, and by him carried to the meeting of the clerks on the next day, with the accidental omission of the year of the election; — while violations of law, on the part of the election officers, are not such irregularities as will, in the absence of fraudulent purpose or intentional violation of duty, invalidate the election.

The Committee on Elections, to whom was referred the petition of Sylvander Johnson of Adams praying that he may be allowed a seat in the House as one of the representatives of District No. 2, in the county of Berkshire, in the place of Lansing J. Cole of Cheshire, report: —

District No. 2 in the county of Berkshire is composed of the towns of Adams, Cheshire, Clarksburg, Florida and Savoy, and is entitled to two representatives. * * * *

The clerks of the several towns in said district duly met, according to law, on the day following the election, for the purpose of ascertaining who were elected representatives of such district by

the legal voters thereof. It appears, by the record of their proceedings, that they rejected the votes from the town of Savoy, "in consequence of informality in not being sealed up." The effect of thus rejecting the vote of Savoy, was to give Russell C. Brown of Cheshire and Lansing J. Cole of Cheshire, a plurality of the votes counted, and the said clerks thereupon declared said Brown and Cole duly elected, and issued their certificates accordingly.

The investigation before the committee took a wide range. Upon the record of the proceedings at the meeting of the clerks, it appears that the only question raised was, whether or not the vote of the town of Savoy should be rejected because the transcript was not sealed up; but upon the hearing before the committee, the parties alleged that similar and equally important informalities occurred in the proceedings of the officers of the other towns in the district; and it therefore became necessary to examine into the formality and regularity of the proceedings of the selectmen and clerks of each of said towns.

The provisions of law regulating the duties of selectmen and town clerks, which are alleged to have been violated in this case, are contained in the Act of 1857, chapter 311, section 5.*

After the votes are received, sorted, counted and declared, this act provides "the result of said ballotings shall be recorded in the town book of records, according to the declaration thereof made, and the selectmen and town clerk shall, forthwith, make out under their hands, and seal up, in open town meeting, a true transcript of the record of such result and deliver the same to the clerk." It is then made the duty of the clerk to take this transcript, thus sealed up, to the meeting of the clerks of the several towns forming the district, directed to be held the day following the election. There is no express provision that the clerk shall not break the seal, and open the transcript before the said meeting of the clerks, but the committee think that, by necessary implication from the provisions of the act, it is clearly a breach of duty, and violation of law in the clerk to do so.

The committee regret to find that in no one of the towns composing this district, were these provisions of law, in all respects, complied with.

They submit a brief statement of the facts in regard to each town.

In all the towns the votes were duly received, sorted, counted and declared in open town meeting.

In the town of Florida, the clerk recorded the result of the balloting, and a transcript of the record was duly made, signed,

* Substantially the same provisions as those now contained in Pub. Sts. ch. 8, § 8.

sealed up, and delivered to the clerk in open town meeting. But on the morning of the day following, some hours previous to the meeting of the clerks, the clerk of Florida broke open the sealed envelope containing such transcript, and exhibited the transcript to one of the selectmen of Adams. He afterwards, before the meeting of the clerks, re-sealed it.

In the towns of Adams and Clarksburg, the record and transcript were made after the adjournment of the meeting, the only irregularity being, that they were not made in open town meeting.

In the town of Savoy, the clerk made up his record after the adjournment of the town meeting, and carried to the meeting of the clerks on the next day, an attested copy thereof, which does not appear to have been signed by the selectmen, or sealed up.

In the town of Cheshire, the clerk made up his record on the second day after the town meeting. A statement of the votes for representatives was drawn up, signed by a majority of the selectmen and by the clerk, sealed up and delivered to the clerk in open town meeting, and by him carried to the meeting of the clerks on the next day. By an accidental omission, the year in which the election was held did not appear upon this statement.

It should be stated that there is no suspicion of any fraudulent purpose or any intentional violation of duty on the part of any one of the officers of the several towns. The law was of recent enactment, and most of the town officers were not familiar with its provisions, and were thus led into informalities which will not be likely to occur in future.

The question which arises under this state of facts, is, whether the neglect of the town officers to comply with the requirements of law, as proved in this case, ought to have the effect to invalidate the election, and defeat the will of the voters fairly and legally expressed through the ballot-box. The committee are of the opinion, that the provisions of law under consideration, are directory to the officers of the towns merely, and are not conditions, upon which the right of the voters to be represented depends. It should be borne in mind, that in this case there has been no violation of any provisions of law defining the duties of voters or affecting the integrity of the election. The citizens faithfully observed all the regulations imposed by law, as the conditions upon which they are to exercise their highest right under the constitution, the right of suffrage, and no subsequent neglect of duty by the recording or returning officers should be allowed to operate to disfranchise them. The only provisions of law, which were violated in this case, are provisions defining the duties of town officers *subsequent to the election;* and to hold that any neglect to comply with these

provisions shall disfranchise the voters, would be to place it in the power of any designing or ignorant recording or returning officer, to entirely defeat the right of suffrage.

The principle which should govern this, and kindred cases, seems to be, that the will of the people, legally expressed through the ballot-box, if it can be ascertained with certainty, shall prevail.

The committee believe that the principles of construction which they apply to the provisions of law in question, are in accordance with the uniform decisions of this house in cases of controverted elections, and have also received the sanction of the highest judicial tribunal of the Commonwealth.

Applying the principles above stated to the facts of this case, it results, that the votes of all the towns in the district should be counted, and that Russell C. Brown and Sylvander Johnson, having received a plurality of the votes cast in the district, were elected.

Your committee therefore report that the said Lansing J. Cole is not entitled to a seat in this House; and that the said Sylvander Johnson was duly elected one of the representatives of the second district in the county of Berkshire, and is entitled to his seat.

[The report of the committee was accepted. H. J. 1858, p. 150.]

WILLIAM MARTIN *v.* RUSSELL C. BROWN.

House Document, No. 21. 1858.

[This was considered as part of the case of JOHNSON *v.* COLE, *supra*, and depended upon the same facts. The petitioner had leave to withdraw, and the report was accepted. H. J. 1858, p. 150.]

SAMUEL BECK ET ALS. *v.* SEDGWICK L. PLUMMER ET AL.

House. Unprinted. January 29, 1858. Report by MARCUS MORTON, JR., *Chairman.*

Failure to make Transcript of Record in Open Town Meeting. — The provisions of sect. 5, chap. 311, Acts of 1857 (Pub. Sts., chap. 8, § 8), are merely directory to the town officers, and a failure to comply with them will not invalidate an election for representative legally and fairly conducted, the result of which can be ascertained with certainty.

The Committee on Elections, to whom was referred the remonstrance of Samuel Beck and others, against the right of Sedgwick L. Plummer and Edward J. Collins to hold seats in this House, from District No. 8, in Middlesex County, report:

The Eighth Middlesex District is composed of the towns of Newton and Brighton, and is entitled to two representatives.

If the votes cast in both towns at the late election are to be counted, the said Sedgwick L. Plummer and Edward J. Collins have a large plurality, and are entitled to their seats.

The remonstrants allege that the record of the result of the balloting in the town of Newton was not made up in open town meeting, and that a transcript of such record was not made, signed and sealed up in open town meeting, according to the provisions of the Act of 1857, chapter 311, section 5; and they therefore contend that the votes of the town of Newton ought to be rejected. The facts, as proved to the committee, are as follows: The record of the town meeting in Newton was made up after the adjournment of the meeting. The clerks of the two towns met at the town hall in Newton on the day following the election, according to law. The clerk of Newton had, at this meeting, the original minutes of the votes for representatives, from which the selectmen had made the public declaration in open town meeting, and from which he had made up his record.

The clerk of Brighton had, at this meeting, what purported to be a transcript of the record of the result of the balloting in that town, duly signed and sealed up; but his record was not made up in open town meeting; he made up his record after the adjournment of the meeting, at which the paper which he calls a transcript was made, and sealed up.

It thus appears that the provisions of the Act of 1857, chapter 311, section 5, were not complied with, in either town. The committee are of the opinion that these provisions are directory to the

town officers merely, and that a failure to comply with them by such officers ought not to invalidate an election legally and fairly conducted, and by which the result can be ascertained with certainty. In this case there is no doubt about the legality and fairness of the election, and it is admitted that if effect is given to the will of the voters, as legally expressed, the sitting members are entitled to their seats. The committee, therefore, recommend that the remonstrants have leave to withdraw.

[The report of the committee was accepted. H. J. 1858, p. 164.]

ALLEN CUMMINGS *v.* ELIEL SHUMWAY.

House document, No. 31. February 2, 1858. Report by MARCUS MORTON, JR., *Chairman.*

Error in Transcript of Record corrected. Where the transcript of the record of the vote of a town, carried by the town clerk to the meeting of clerks on the day following the election, showed that fifty-two votes were given for *Alden* Cummings, while the record itself showed that these votes were given for Allen Cummings, — they were counted for the latter.

Evidence. Additional Votes proved to have been cast for Contestant. Where the contestant and sitting member ran on the same ticket, and each was given, upon the returns from a town, the same number of votes, the sitting member was allowed to prove that only the votes upon the regular ticket had been counted for him, and that nineteen persons voted for him, who did not vote the regular ticket, or for the contestant, — and thereupon it was *held* that nineteen votes should be added to those returned for him.

TAPPAN WENTWORTH, *for petitioner.*
GEORGE S. BOUTWELL, *for sitting member.*

The Committee on Elections to whom was referred the petition of Allen Cummings, of Dunstable, claiming to be admitted to a seat as a member of the House from the twenty-sixth district in the county of Middlesex, in the place of Eliel Shumway, of Groton, report:

The said district is composed of the towns of Shirley, Groton, Dunstable, Westford and Pepperell, and is entitled to two representatives.

The petition sets forth that it appears from the records of the several towns in said district, that at the annual election in November

last, the petitioner received three hundred and fifty-one votes for representative, and that the sitting member, Eliel Shumway, received only three hundred and forty-three votes. It was admitted that the transcript of the record of the vote of Shirley, which was carried by the clerk of Shirley to the meeting of clerks held on the day following the election, declared that fifty-two votes were given for *Alden* Cummings, whereas it appears from the record itself that these votes were given for Allen Cummings. In consequence of this error, the certificate of election was issued to Eliel Shumway, the sitting member.

The answer of Mr. Shumway admits the truth of the facts set forth in the petition, but asserts that there were errors in counting, declaring and recording the votes in the town of Groton; that by the records of said town of Groton, it appears that said Shumway received only one hundred and thirty-two votes, whereas in fact, he received one hundred and fifty-one votes or more, and that if the votes of Groton had been counted, declared and recorded correctly, he would have been duly elected.

The record of the votes for representatives in Groton was as follows: —

Whole number of ballots,	283
Eliel Shumway, of Groton, had	132
Allen Cummings, of Dunstable, had	132
Robert P. Woods, of Groton, had	126
Andrew Spaulding, of Dunstable, had	70
Norman Shattuck, of Groton, had	8
John W. P. Abbot, of Westford, had	69

It is agreed that the names of Shumway and Cummings were generally borne upon the same ballots, they being the regular candidates of the same political party; and it was claimed by Mr. Shumway, that Shumway and Cummings received each one hundred and thirty-two votes, upon the same one hundred and thirty-two ballots, and that the scattering votes for said Shumway and Cummings were accidentally omitted, either by the selectmen in counting and declaring, or by the clerk in recording, the votes of the town.

The committee submit an abstract of the testimony laid before them.

The votes for representatives were received in a box by themselves. Immediately after the polls were closed, a meeting was organized, in the same room, for the transaction of town business. The chairman of the selectmen and the town clerk were occupied

by the business of this meeting, for about half an hour. The other two selectmen (Robert P. Woods and Norman Shattuck) proceeded at once to sort and count the votes. They separated the ballots for representatives into four parcels, one parcel for each of the three regular tickets, and one parcel for the irregular or scattering ballots. All the witnesses agree that the largest parcel of regular tickets bore the names of Shumway and Cummings, and that Mr. Shumway's name was also borne upon some of the scattering ballots, though they differed in their estimate of the number. The witnesses also all agree that there were only four or five single ballots, or ballots bearing only one name. The town clerk (George D. Brigham) testified, that after the town business had been disposed of, he saw the chairman of the selectmen count the largest parcel of votes, containing the names of Shumway and Cummings; that at first he made the number one hundred and thirty-one, but finding this to be one less than the count which had been made by the other selectmen, he counted it again, and made the number one hundred and thirty-two, thus agreeing with the other selectmen.

The chairman of the selectmen (Joshua Gilson) testified that he counted the parcel of regular tickets for Shumway and Cummings, and that he did not count any other ballots containing the name of Shumway; but he could not state, from his recollection, how many ballots this parcel contained. Another witness (J. J. Randall) testified, that he stood so near the table that he could read the names on the ballots, that he saw the other two selectmen count the parcel of ballots which bore the names of Shumway and Cummings, that the witness counted with the selectmen and made the number of ballots one hundred and thirty-two, and that he saw one of the selectmen write the number one hundred and thirty-two on a piece of paper, as the result of his own count of the said parcel of ballots.

Another witness (E. S. Clark) testified that he saw one of the selectmen count the parcel of regular ballots for Shumway and Cummings: that he inquired of him the number of votes for Shumway and Cummings, and was told that they had received one hundred and thirty-two votes each. All these witnesses testified that there was a parcel of scattering votes on the table which had not been counted to make up the one hundred and thirty-two votes in question. There was some testimony tending to contradict these witnesses, but not enough to affect their credibility or accuracy, in the minds of the committee. The other two selectmen testified that they sorted and counted the votes in the usual manner, and they believe that they declared them, and gave them to the town clerk correctly.

There was a great difference of opinion between the different witnesses as to the number contained in the parcel of scattering ballots, but no one estimated it to be more than thirty.

No witness could testify from memory how many votes Shumway or Cummings had in this parcel. The two selectmen (Woods and Shattuck) thought that the number of scattering votes for Shumway and Cummings was equal, but the other witnesses, who spoke to this point, testified that Shumway's name was borne on most of the scattering ballots, while Cummings's name was on few, if any, of them.

Had the case stopped here, the committee, though satisfied that there was an error in the record, might have found it difficult to determine whether Shumway or Cummings was elected. But it further appeared, from the testimony of sixteen legal voters, that each of them voted for Mr. Shumway and some other person, not Mr. Cummings; and from the testimony of three other voters, that each of them voted for Mr. Shumway and no other person; thus proving that Mr. Shumway had nineteen votes, at least, in the parcel of scattering ballots. It also appeared that there was one ballot for Cummings and Woods; and it was not shown that Mr. Cummings received any other scattering votes. Unless we discredit the testimony of these nineteen witnesses, we are constrained to regard the testimony of those who state that the number of scattering votes for Shumway and Cummings was precisely equal, as the result of an inference from the appearance of the record, rather than an exercise of the memory. That there is an error is apparent from the record itself, and was admitted by both sides. After allowing for the four single ballots proved to have been cast, the whole number of ballots does not correspond with the aggregate number of votes for the different candidates; but if the scattering votes shown to have been cast for Mr. Shumway and Mr. Cummings be added to their recorded votes, it would reconcile the record with itself as nearly as from the nature of the case could be expected

The committee are satisfied that Mr. Shumway received one hundred and fifty-one votes and that Mr. Cummings received one hundred and thirty-three votes, in the town of Groton, making the whole vote of Mr. Shumway in the district, three hundred and sixty-two, and the whole vote of Mr. Cummings in the district three hundred and fifty-two. The committee therefore recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1858, p. 171.]

CALVIN R. TAFT *v.* JOHN M. COLE.

House document, No. 36, February 4, 1858. Report by RICHARD S. SPOFFORD, JR.

Envelopes containing Ballots must be official. Section 2 of chapter 36 of the Acts of 1853 (substantially, section 4 of chapter 7 of the Public Statutes), prescribing the kind of envelope to be used at elections, and providing that no other envelopes shall be used at the polls, is not merely *directory*, but being prohibitory in expression and effect, is *mandatory*, and ballots enclosed in envelopes not bearing the seal of the Commonwealth, should not be counted.

See *contra*, Whitaker *v.* Cummings, *post*.

JAMES T. ROBINSON, *for petitioner.*

The Committee on Elections, to whom was referred the petition of Calvin R. Taft, of Williamstown, for the seat in the House of Representatives now occupied by John M. Cole, have considered the same, and respectfully submit thereon the following report:

The first representative district in Berkshire County, is composed of the towns of Williamstown, Lanesborough, Hancock and New Ashford, and is entitled to one representative. At the last election in said district, the whole number of votes cast for representative was six hundred and sixty-five, of which John M. Cole received two hundred and ninety; Calvin R. Taft two hundred and eighty-three, and William E. Johnson ninety-two. It thus appearing that John M. Cole had received a plurality of the votes, he was forthwith declared duly elected according to law.

It is alleged, however, by the petitioner, in his petition, that thirteen of the ballots counted by the selectmen of the town of Williamstown (twelve of which were votes for John M. Cole, and one a vote for Calvin R. Taft), should have been rejected because of their illegality in having been cast in *unofficial* envelopes, that is to say, envelopes not bearing the emblematic seal of the Commonwealth; and that if the aforesaid thirteen ballots had been rejected, the petitioner, and not the present incumbent of the seat, would have been elected.

The fact here presented by the petitioner was not denied by Mr. Cole; and it has been made to appear beyond doubt by the testimony of several witnesses before the Committee.

The whole question, therefore, to be determined in the present case, is, of the legal admissibility of the thirteen ballots contained in the unofficial envelopes aforesaid, to be counted as such by the selectmen. If the selectmen were justified by law in counting the

said ballots, then the sitting member was duly elected, and is lawfully entitled to the seat; if they were not so justified by law, then the petitioner, Calvin R. Taft, having received a plurality of the legal votes, was duly elected, and is lawfully entitled to the same.

The question has been ably argued by learned counsel, and the committee have given to it that careful consideration which it was entitled to receive. Solicitous that the will of the people, when legally ascertained, should not be defeated by any mere technicality, or error of form, they have endeavored to construe the law applicable to the present case, in the same spirit of liberality, by which they have been governed in the cases of contested elections which have preceded it. But the question involved has been one of considerable difficulty, and the committee have experienced somewhat of embarrassment in its decision.

Were the ballots contained in the unofficial envelopes legal ballots, and, as such, entitled to be counted by the selectmen, in ascertaining the result of the election? that is the question.

By reference to an Act of the legislature, entitled "An Act concerning the manner of voting," approved March 2, 1853, (Act of 1853, chap. 36,) the following pertinent provision of law is found, namely: —

"SECT. 2. Self-sealing envelopes of uniform size and color, bearing the emblematic seal of the Commonwealth, shall be furnished at the expense of the State, (as heretofore, in accordance with the provisions of a law passed in the year 1851,) to all persons who may desire, at any election herein before specified, to deposit their ballots therein, and no other envelopes shall be used at the polls." *

It will be perceived that the title of this Act, as well as the tenor of the section above quoted, contemplates, not merely the acts of the officer who shall preside at elections, but also the acts of the voters themselves; and that, after providing that State envelopes shall be furnished to such persons as may desire them, it proceeds, in express terms, to say that "*no other envelopes shall be used at the polls.*"

Your committee are unable to regard the last clause of this section of the Act of 1853 as directory merely; it is, in their opinion, peremptory, and more emphatically so, from the fact that it is prohibitory in expression and effect. It does not say simply

* Substantially the same as Pub. Stats. ch. 7, § 4.

that a certain thing *shall be done;* but it declares in unequivocal terms, that a certain thing *shall not be done.* The language of the Act is not to the effect that *State envelopes* shall be used at the polls, in which case it might perhaps have been regarded as directory; but it is to the effect that *no other envelopes* shall be so used, and, therefore, must be considered, in the sense of prohibition, as peremptory.

The learned counsel for the sitting member, in presenting this point, argued, that because the Act of 1853 repealed the Act of 1851, in which there was express provision that all ballots contained in unofficial envelopes should be rejected, and because no such provision was re-enacted in the Act of 1853 itself, that therefore the Act of 1853 intended to legalize such ballots, and justify their being counted by the officers who preside at the polls.

Although it is true, what the argument assumes, that no provision that such ballots shall be rejected is contained in the Act of 1853, in so many words, yet, your committee are of the opinion that there is less doubt in determining that this was the real purpose of the Act, intended to be expressed in the phrase "no other envelopes shall be used at the polls," than in adopting a contrary conclusion, by reason of an implied meaning, to be inferred, upon a construction of this Act in connection with another Act which it repeals. The words of the Act of 1851 are undoubtedly more explicit upon the point in controversy, than are the words employed in the Act of 1853; but is not this fact suggestive of a thought consonant with the construction given to the latter by the committee? If the legislature which passed the Act of 1853 had intended to change the pre-existing provisions of law upon the subject, and admit such ballots as are here in question, to be counted, would it have left its intention in so important a matter to be ascertained by implication only? And yet the argument amounts to this, and asks that an express provision of law shall be entirely disregarded, in order that a questionable implication of law may be allowed to prevail. This, in the opinion of the committee, it would not be wise and proper for them to do.

The committee are confirmed in their opinion that the Act of 1853 cannot be considered as merely directory, by still another view of the question.

It has been observed that, in parenthesis, in the section of that Act above quoted, it is enacted, that State envelopes shall be furnished to all persons who may desire to deposit their ballots therein, "*in accordance with the provisions of a law passed in the year 1851.*"

By reference to the Act of 1851 (Act of 1851, chap. 226) we find that, in so far as it relates to the matter in hand, it reads as follows: —

"SECT. 4. It shall be the duty of the selectmen of each town, and the wardens and inspectors of every ward in each city within the state, to obtain from the clerks of their several towns and cities, and provide at the polls, on the day of election, a sufficient quantity of the envelopes aforesaid, and to appoint two or more suitable persons to take charge of the same, *and supply each person claiming to be a voter in the said town or city, on his personal application, and no others, with such a number as the pending election may require*, and to return to the clerk aforesaid all envelopes not used."

Now, bearing in mind the fact, that these provisions are ingrafted in, and constitute a part of the Act of 1853, the committee derive support therefrom in aid of their construction of that Act; for, in the absence of proof to the contrary, it is to be presumed that the public officers performed their duty, and that all these provisions of law were complied with in the present case. And in this relation, when your committee reflect upon the restrictive terms of this enactment, and consider how carefully it provides as to the time when, place where, and manner in which, the State envelopes are to be supplied to the voters of any town or city,— limiting the number thereof to such number as the pending election may require,— they are satisfied that their construction of the Act of 1853 is a correct one, and that the unofficial envelopes in the present case were not legal, and should have been rejected by the selectmen.

Upon the premises of undisputed fact in the case, therefore, and upon the legal considerations applicable to the same, which have thus been presented, the committee are unanimously of the opinion that John M. Cole is not entitled to the seat in the House of Representatives now occupied by him, and that the petitioner, Calvin R. Taft, having been legally elected a representative, is entitled to the same.

[The report of the committee was accepted, H. J. 1858, p. 190. A motion was made to reconsider, and negatived, H. J. 1858, p. 196.]

THORNTON K. LOTHROP ET ALS., PETITIONERS.

House Document, No. 77. March 1, 1858. Report by MARCUS MORTON, JR., *Chairman*.

Apportionment of Representatives in Boston, must be by Mayor and Aldermen. Under the 21st amendment to the Constitution, providing that after the apportionment of representatives to the county of Suffolk, the Mayor and Aldermen of Boston shall divide the county into representative districts so as to apportion the representation assigned to the county equally, as nearly as may be, according to the relative number of legal voters in the several districts,—the duty is imposed upon the Mayor and Aldermen, not only of dividing the county into districts, but also of designating the number of representatives, not exceeding three, to which each district is entitled, and their action in such apportionment is not merely ministerial, but judicial, and cannot be revised by the House of Representatives.

The Committee on Elections, to whom was referred the petition of Thornton K. Lothrop and others for an alteration of the apportionment of representatives in the second and sixth districts of the county of Suffolk; also, the petition of E. W. Wellman and others, in aid of the same; also, the petition of George S. Hillard and others in aid of the same, submit the following report: The original petition in this case is as follows: "The undersigned, legal voters of the sixth representative district of the county of Suffolk, and a committee appointed by the legal voters of the said district in this behalf, respectfully represent to your honorable body, that by the Constitution and laws of the Commonwealth, the said district is entitled to elect three representatives to your honorable body, but that by the apportionment of representatives among the several districts of the said county, made by the mayor and aldermen of the city of Boston, in the month of August now last past, only two representatives were assigned to said district; and the warrant, calling the meeting of the voters in said district on the first Tuesday of the present month of November, for the election of representatives therein, directed the said voters to bring in their votes for (only) two representatives, as the number to which the said district was entitled; by reason whereof only two representatives were chosen in said district at said election. And your petitioners further state that the second representative district in said county of Suffolk is by the Constitution and laws of this Commonwealth entitled to elect only two representatives to your honorable body; but that by the aforesaid apportionment three representatives were assigned to said second district, and that the

warrant calling the meeting of the voters in said second district for the election of representatives therein, on the said first Tuesday of November, directed the said voters to bring in their votes for three representatives, as the number to which the said second district was by law entitled, by reason whereof, three persons were chosen as representatives to your honorable body, from the said second district; whereas, by law and by right the said second district, as before stated, is entitled to elect only two representatives.

"Wherefore, and in consideration of the premises your petitioners pray that the said election of representatives in the said second district, so far as the same is against the constitution and laws of the Commonwealth, may be set aside, and the persons chosen as representatives therein, so far as they, or any of them were not legally chosen, or are not entitled to a seat in your honorable body, may be declared not members thereof, and that a precept may issue to the said sixth district for the election of a representative to your honorable body, in addition to those already chosen therefrom, and for such other and further relief as law and justice may require, and to your honorable body may seem meet."

The case presented by the petitioners depends entirely upon the construction to be given to the twenty-first article of amendment of the Constitution, ratified by the people on the first day of May, A.D. 1857.

The material facts, which are not controverted, are as follows: —

The legislature, acting under the provisions of the said twenty-first article of amendment, passed an "Act to apportion representatives to the several counties," which Act was approved by the governor on July 29, 1857. By this Act, twenty-eight representatives were apportioned to the county of Suffolk, which number was duly certified by the secretary of the Commonwealth to the mayor and aldermen of the city of Boston, the board authorized by said article of amendment, to divide the county of Suffolk into representative districts.

On the first Tuesday of August, the mayor and aldermen proceeded, according to the provisions of the said article of amendment, to divide the county of Suffolk into representative districts for the choice of the twenty-eight representatives so apportioned to the said county.

It may be stated as a part of the history of the case, though perhaps not material to its correct decision, that this duty was not performed by the mayor and aldermen as a single tribunal with the mayor sitting as a member thereof. The board of aldermen had previously appointed a committee to prepare and submit a plan of

apportionment; the report of this committee was presented to the board of aldermen on the fourth day of August, and on the same day, after some amendments by them accepted, and an order dividing the county into thirteen districts, passed and sent to the mayor for his approval. On the tenth day of August the mayor returned the said order, with his objections, and the board of aldermen thereupon passed it, notwithstanding the said objections, by a two-thirds vote. By this apportionment each of the twelve wards of the city of Boston was made one district, the numbers of the districts corresponding with the numbers of the wards, and the city of Chelsea and the towns of North Chelsea and Winthrop, composed the thirteenth district.

The several districts, thus constituted, appear in the following table: —

	Legal Voters.	Number of Representatives.
District No. I.,	1,709	2
II.,	1,916	3
III.,	1,755	2
IV.,	1,961	2
V.,	1,907	2
VI.,	2,392	2
VII.,	1,573	2
VIII.,	1,828	2
IX.,	1,445	2
X.,	1,766	2
XI.,	2,020	2
XII.,	2,406	3
XIII.,	2,067	2

It will be seen by the above table, that the mayor and aldermen assigned to the second district, containing 1,916 legal voters, according to the enumeration taken by the census of the State, three representatives, while they assigned to the sixth district, containing 2,392 legal voters, only two representatives.

The reasons for this apparent inequality were stated by the committee of the board of aldermen, who reported the plan of apportionment to be, that there are large areas of unoccupied land in the second district, and that therefore a large increase of population might be expected, while in the sixth district the land is now so covered with dwelling-houses, that there is little room for expansion, and the future increase of legal voters must be comparatively small.

It was also testified before your committee, by a member of the board of aldermen who made the apportionment, that their action

was influenced by a supposed error on the part of the State censors in taking the enumeration in the city of Boston. The assessors of the city of Boston annually take a census of the legal voters in each ward, on the first day of May, for the purpose of making up the voting lists; and it appeared in evidence, that the number of legal voters, as determined by the assessors on the first day of May, A. D. 1857, was as follows: —

	Legal Voters.		Legal Voters.
Ward No. I., . .	2,026	Ward No. VII., .	1,421
II., . .	2,445	VIII., .	1,729
III., . .	1,858	IX., .	1,681
IV., . .	1,700	X., .	2,028
V., . .	2,092	XI., .	2,808
VI., . .	2,133	XII., .	2,409

Your committee are not furnished with the means of explaining the great difference between these two returns, each purporting to be an enumeration of the legal voters in the city of Boston on the same first day of May. It should be stated that the enumeration by the assessors had not been completed and returned at the time when the board of aldermen made their apportionment, but the witness testified that enough was known of the result to lead to the belief that great errors had been committed by the State censors.

In the view which the committee take of the question which underlies this whole case, perhaps much of the above testimony was not properly admissible. As the committee have come to the conclusion that the mayor and aldermen of the city of Boston, and the county commissioners of other counties than Suffolk, were made by the twenty-first article of amendment a constitutional tribunal, upon whom was devolved the duty, in the exercise of their judicial discretion, of dividing their several counties into representative districts, and of apportioning among such districts the representation assigned to each county, it is probably not competent for the house or its committee to inquire into the motives or reasons which controlled the exercise of that discretion, but your committee have deemed it proper to report all the facts for the consideration of the house.

Under this state of facts, the petitioners claim that the action of the mayor and aldermen was erroneous and unconstitutional, and ought to be revised and annulled by this house, under the provisions of the Constitution which makes the house of

representatives the "judge of the returns, elections and qualifications of its own members, as pointed out in the Constitution.'

They base their claim upon two distinct grounds. First, they argued that the mayor and aldermen had no authority, under the twenty-first article of amendment, to assign and designate the number of representatives to which each district in the county, as created by them, was entitled; that the only duty imposed upon them and the only power conferred upon them, was to divide the county into representative districts, to number the districts, and to return a "description of each, with the numbers thereof, and the number of legal voters therein," to the secretary of the Commonwealth, the county treasurer and the clerk of each town in each district; that the number of representatives to which each district is entitled is to be determined by the State enumeration, and that the officers who are charged with the duty of issuing the warrants for the meetings of the voters, are to judge, in the first instance, as to the number of representatives, to which their district is entitled according to the said enumeration, subject to the final revision of the house.

But the committee are unable to concur in this view.

Taking into view the whole scope and purpose of the article of amendment, it seems very clear that it was designed to impose upon the mayor and aldermen and the county commissioners the duty, not only of dividing the several counties into territorial districts, but also of apportioning among such districts the representation assigned to each county. The designation of the number of representatives to which the several districts are entitled is a necessary element in the division. No other board or officer is clothed with that power. In the country counties, where several towns are united to form one district, such district has no officers or agents who can designate to each town the number which shall be specified in the warrants as the number of representatives for which the voters are to bring in their ballots, and unless this power be lodged with the board of commissioners who create the district, the officers of each town must judge, at their own peril, of the number to be voted for, and great confusion might ensue. It may be observed, too, in this connection, that since the twelfth article of amendment was adopted in 1836, when the first germ of the district system of representation appeared in our Constitution, the uniform policy of the State has been to provide for some central board whose duty it has been to apportion the representation among the several districts and towns.

It seems also to the committee that a fair construction of the language of the article of amendment leads to the same result.

The article provides that the mayor and aldermen, or the county commissioners, shall divide the county "into representative districts of contiguous territory, so as to apportion the representation assigned to each county, equally as nearly as may be, according to the relative number of legal voters in the several districts of each county." The expression "so as to apportion," implies an active duty to be performed by some one, and no officers except the mayor and aldermen or the county commissioners are mentioned, or can be intended, as charged with that duty. The petitioners contended that "the enumeration aforesaid" is to apportion the representatives; but an enumeration cannot apportion, it can only determine the rule by which an apportionment shall be made.

It may be proper to add, that this clause has received a legislative construction in the Act of 1857, chapter 311, section 8, which provides that "it shall be the duty of the county commissioners, mayor and aldermen, or board of aldermen, or such special commissioners as are by law *authorized to apportion* the representation assigned to the several counties" to appoint a place for the meeting of the clerks to ascertain the result of the election.

The committee, for these reasons, are of the opinion that the twenty-first article of amendment imposes upon the mayor and aldermen the duty, not only of dividing the county into territorial districts, but also, as a necessary part of that division, of designating the number of representatives to which the districts are entitled, and that therefore, in so doing, they did not exceed their powers. The committee are strengthened in their opinion, by the fact, that every board of county commissioners in the Commonwealth took the same view of their duty in this respect.

Second. The petitioners contended, that, if it was a part of the duty of the mayor and aldermen to apportion the representation among the several districts created by them, this was merely a ministerial duty; that in the performance of such duty they had no judicial functions to exercise, but were merely computing agents, receiving certain elements which they were to combine, and by a mathematical calculation make certain and declare the result, and that if they committed any error or mistake, the house had the right to go behind and revise their proceedings.

Without discussing the question whether, where a board of officers is created *by the Constitution*, and by it clothed with certain duties merely ministerial, any other tribunal, except the supreme judicial court, can control such board in the exercise of its powers, and revise its proceedings, the committee are of the opinion that

the powers conferred upon the mayor and aldermen and the county commissioners by the twenty-first article of amendment are judicial in their nature, involving in a high degree the exercise of discretion and judgment on their part. They are "to assemble at a shire town of their respective counties, and proceed, as soon as may be, to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the relative number of legal voters in the several districts of each county; and such districts shall be so formed that no town or ward of a city shall be divided therefor, nor shall any district be made which shall be entitled to more than three representatives." No argument is needed to show that the mayor and aldermen and county commissioners are by this provision invested with discretionary powers to a great extent. They are to perform a difficult, and in many cases a most perplexing duty, involving many considerations, capable of being performed in many different ways, each leading to a different result, and only to be performed by the exercise of a sound judicial discretion. It is probably not too much to say, that no two boards, acting at the same time and independently of each other, would arrive at precisely the same result. Yet if the act to be performed is merely ministerial, the result of a pure mathematical calculation, it would be impossible for them to arrive at different results. It was argued by the petitioners that the duty to be performed by the commissioners might be divided; that while the division of the county into districts was within their discretion, the apportionment of representatives among such districts was ministerial. But the committee have already expressed the opinion that the designation of the number of representatives to which the districts are severally entitled, is a necessary part of the creation of the districts, and to change this number would change the inherent qualities and nature of the district.

It seems to the committee that the design of the article of amendment under consideration was to provide, that at the commencement of each decennial period, the State should be divided into districts and the two hundred and forty members of the house of representatives apportioned among such districts, that such division and apportionment should remain fixed and unalterable during such decennial period, and that the duty of making such permanent division and apportionment should be intrusted to the discretion of the mayor and aldermen of the city of Boston and the county commissioners of other counties than Suffolk, or such board of special commissioners as might be provided by law.

No power is reserved to any other tribunal to make any new

division or apportionment, and it would seem that no other tribunal can do so without usurping powers not conferred upon it by the Constitution. If this house may make any change in the division and apportionment, upon the same principles, every house during the decennial period may do the same, and thus the distribution of representatives, instead of being fixed and permanent, would be fluctuating and uncertain, and the manifest design of the Constitution be contravened.

The power under which the house is called upon to act is not an unlimited power; the constitutional provision which confers this power is as follows: "The house of representatives shall be the judge of the returns, elections and qualifications of its own members, *as pointed out in the Constitution.*" If the Constitution provides that another tribunal, created or designated by itself, shall divide the State into districts, and apportion representatives to such districts, the house is as much bound by such provision, as it is by the provision requiring that a plurality of votes shall elect, or the provisions as to age, residence, or other qualifications.

The committee have considered the subject with great care, and anxious desire to arrive at a correct result, and they have been constrained to come to the conclusion that it is not competent for the house to revise and annul the proceedings of the mayor and aldermen, according to the prayer of the petition, and they therefore report that the petitioners have leave to withdraw.

[Upon the presentation of the report, the house requested the opinion of the justices of the supreme judicial court upon the question raised by the petition, and they submitted an opinion affirming the views of the committee. (*Opinion of Justices*, 10 Gray, 613, *post.*) The report of the committee was accepted. H. J., 1858, p. 463.]

HOUSE—COMMITTEE ON ELECTIONS, 1859.

Messrs. NATHANIEL HINCKLEY of Barnstable, *Chairman;* OTIS A. SEAMANS of Springfield, AUGUSTUS L. WEST of New Bedford, ALANSON BIGELOW of Cambridge, STEPHEN N. STOCKWELL of Boston, NATHAN B. EDWARDS of Chelmsford, and GUSTAVUS ATTWILL of Lynn.

ALEXANDER NEWCOMB *v.* JOSEPH WHELDEN HOLMES.

House Document, No. 1. January 15, 1859. Report by NATHANIEL HINCKLEY, *Chairman.*

Irregularity. Failure of Selectmen to post Voting List before Election. The fact that the selectmen of a town failed to post a list of voters prior to an election as provided by law, in the absence of evidence, that such failure was the occasion of the refusal of the vote of any person who had the right to vote, of any illegal voting, or any other oppressive result, will not invalidate the election.

Same. Failure to seal up Transcript. The fact that the selectmen of a town failed to seal up the transcript of the record of the votes cast at an election, it being admitted that the votes were duly received, assorted, counted and declaration thereof made in open town meeting, will not invalidate an election.

Same. Unauthorized Alteration of Transcript by Town Clerk to make it conform to Truth. Where the ballots were cast and counted for J. W. Holmes, the name of one of the candidates for representative, and the town clerk ignorantly supposing the name to be *John* instead of *Joseph*, entered it so upon the record or upon the transcript thereof, and when upon the way to meet the clerks of the other towns in the district, on the day following the election, opened the said transcript and erased the letters *ohn* from the word *John*, leaving J, conformable to the balloting and declaration, it was *held*, that while such conduct was unjustifiable, it should not invalidate the vote of the town

The Committee on Elections, to whom was referred the petition of Alexander Newcomb of Tisbury, praying that he may be allowed a seat in this house as a representative from district number one, in the county of Dukes County, in the place of Joseph Wheldon Holmes of Tisbury, the sitting member, report: Said district is composed of the towns of Chilmark, Edgartown and Tisbury, in said county, and is entitled to one representative.

The parties in this case were content to submit it to the decision of the committee, without summoning witnesses, and upon a statement of facts agreed to by each, and the conclusion of your committee is based upon the facts thus agreed upon.

The vote for the respective parties, as agreed to by them, was as follows:—

Chilmark,	Holmes, 18;	Newcomb, 20.
Edgartown,	" 111;	" 51.
Tisbury,	" 62;	" 95.

The first allegation contained in the petition is "that the statute of this State which requires that a list of the qualified voters be posted prior to any election, was not complied with by the selectmen of Edgartown in said district, at the election in November last." This allegation was admitted by the sitting member. Your committee are of opinion that this omission on the part of the selectmen should not invalidate the election. The failure of town officers to comply with the requisitions of law may render them liable to its penalties, but should not operate to prevent a recognition of the will of the people, which is the basis of our institutions, if that will can be clearly and satisfactorily ascertained. These views are in conformity to reports heretofore made and sustained by the house of representatives. See *Massachusetts Election Cases* (Cushing, S. and J.), *Fryeburgh*, page 41, and *Malden*, page 213.*

The petitioner further represents, "that the transcript or copy of the record of said town was given to the clerk unsealed, contrary to the 5th section of chapter 311 of the Acts of 1857." This allegation was admitted by the sitting member. But it was also admitted by the petitioner, that the votes were duly received, assorted, counted, and declaration thereof made in open town meeting. Under this admission it is contended, that the vote of said town was fairly and legally expressed, and that the failure of the officers to seal up said transcript or copy, *being a subsequent act*, should not operate to the exclusion of the vote of said town thus expressed. To make an election depend upon the accuracy of a return thereof would be to place it in the power of ignorant or designing returning officers to subvert the will of the people, whose servants they are. These views are more fully set forth in a report on the case of *Lysander Johnson* v. *Lansing J. Cole*, which was sustained by the house of representatives in 1858, *ante*, p. 36.

The third and last allegation, and the one most relied upon by the petitioner, sets forth, "that on the next day [after the election], when on his journey to Chilmark, the place appointed for the meeting of the clerks of the several towns in said district, the town clerk of said Edgartown opened the said transcript of the votes of said Edgartown, and materially altered, or caused to be altered, the same; in consequence of which said alteration, the clerks of the several towns in the said district gave the certificate of election to Joseph Whelden Holmes; whereas, but for said alteration of the

* [NOTE BY THE EDITORS. — The position assumed by the committee in refusing to invalidate the election, on account of irregularities in posting list of voters, or giving notice of the election, is fully sustained by the supreme judicial court in the case of *Commonwealth* v *Smith*, 132 Mass. 289, reported in the supplement hereto.]

transcript of the votes given by the inhabitants of Edgartown, made by the town clerk thereof, and without the knowledge of the selectmen of said town, and after the meeting had been dissolved, your petitioner, as he believes, would have been entitled, to and have received the certificate of election."

This allegation was also admitted by the sitting member.

It seems proper here to state that the petitioner disclaimed imputing, either to the selectmen or town clerk, any fraudulent intent, but relied solely upon the legal effect of the informalities set forth and admitted.

A brief explanation relative to the third allegation will serve to show the grounds upon which the committee come to their conclusion.

The sitting member, as stated by himself, and not denied by the petitioner, usually writes his name J. Whelden Holmes, sometimes J. W. Holmes, but never *Joseph* Whelden Holmes.

It was also stated and admitted that the father of said sitting member is John Holmes, who has a son John Holmes, Jr., and a son Charles, and that these are all the voters resident in the said district bearing the name of Holmes, and consequently that there is no other person bearing the name of the sitting member, in either of its forms, resident in said district.

It was further stated and admitted, that the votes were given in for J. W. Holmes, and that the declaration thereof, hereinbefore referred to, was made for J. W. Holmes. In confirmation of this position a printed ballot was produced before the committee, which was admitted by the petitioner to have been used at the election, bearing the names of candidates for all the State and district officers voted for in that election, and thereon was printed, "*For Representative*, District No. 1, J. W. HOLMES, of *Tisbury*."

The theory concurred in by the parties in relation to the alteration of the transcript referred to is, that the town clerk, ignorantly supposing the name of the sitting member to be *John* instead of *Joseph*, entered it thus upon his record, or upon the transcript thereof, and the only change alleged is that the letters *ohn* were erased, leaving the initial *J* conformable to the balloting and declaration. The falsity of the record thus made was unjustifiable, but the *correction* thereof, when the error was discovered, displays an honest intent, and in part atones for the error first made.

It is proper to add, in relation to the first allegation, that the petitioner admitted that the failure of the selectmen to comply with the provisions of law relative to posting up a list of voters, was not the occasion of the refusal of any person's vote who had a right to vote, of any illegal voting, or of any other oppressive result.

The issue in this case seems mainly narrowed down to the question,— "Shall the doings of the town clerk, in being wise above what was written on the ballot and declared, or in writing what was unwise and unauthorized on his record, have the effect to disfranchise the voters of Edgartown?" Your committee are of opinion that it should not be so, and that the sitting member is entitled to his seat.

They therefore recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1859, p. 83.]

JOB T. TOBEY *v.* THEOPHILUS KING.

House Document, No. 8. January 20, 1859. Report by NATHANIEL HINCKLEY, *Chairman*.

Irregularities in Warrant for Meeting. Omission in the warrant for the town meeting for the election, to state the time when the polls would be opened, or whether persons to be voted for should be voted for on one ballot, or at the same time on separate ballots, will not affect the validity of the election.

Failure to make Transcript of Record of the Vote at Time required. Where the selectmen and town clerk of Mattapoisett omitted to make and seal up in open town meeting, a transcript of the record of the result of the election, so that at the meeting of town clerks of the district on the next day after the election, there was no evidence of the vote of the town, except a sheet upon which the result had been entered prior to entry on the records, and from which the result had been declared; and properly deeming this too informal and insufficient evidence of the result, the clerks adjourned until the next day, at which adjourned meeting the clerk of Mattapoisett presented a transcript of the record in the form required by statute, except that it bore date on that day, being the second day after the election. It was *held*, in the absence of proof of fraud or incorrectness in the record, that such transcript, although it had not been sealed up in open town meeting, as required by law, should have been received and acted upon by the clerks.

Failure of Clerks to meet to examine and compare Transcripts at the place designated by the County Commissioners. Failure of the town clerks to meet to examine and compare transcripts, at the place designated by the county commissioners, as required by statute, is unjustifiable, but where there is no pretence that such failure affected the declared result of the election, the return will be regarded as valid.

The Committee on Elections, to whom was referred the petition of Job T. Tobey, of Lakeville, praying that he may be allowed a seat in this house as representative from the eighth representative district, in the county of Plymouth, instead of Theophilus

King, of Rochester, the sitting member, report: Said district is composed of the towns of Lakeville, Mattapoisett, and Rochester, in said county, and is entitled to one representative.

The petitioner represents, that he was legally chosen a representative for said district, on the second day of November now last passed, and "that the several town clerks of said towns, at their meetings duly held for the purpose of ascertaining what person had been legally chosen representative for said district, and giving such person a certificate thereof, rejected the votes of the town of Mattapoisett because they were not returned according to law, and declared Theophilus King, of said Rochester, elected representative for said district, and gave him a certificate thereof, although said King did not receive so many votes in said towns as your petitioner, that is to say, in said three towns."

It appeared, from satisfactory evidence, that no person was voted for as representative from said district other than the parties in this case, and that the entire vote was as follows: —

Lakeville, Job T. Tobey,	.	136	Theophilus King,	. . .	105
Mattapoisett, " "	.	132	" "	. . .	48
Rochester, " "	.	30	" "	. . .	89
		298			242

From these figures, it appears that Mr. Tobey received 56 more votes than Mr. King. Reject the vote of Mattapoisett and Mr. King has 28 more votes than Mr. Tobey. It becomes, then, an important inquiry, whether the vote of Mattapoisett should or should not have been rejected.

The facts in the case, as gathered mainly from the testimony of Thomas Nelson, the town clerk of Mattapoisett, who was summoned to appear before the committee, are as follows: —

The town meeting was duly notified and warned, and the votes were duly received, assorted, counted, declared, and record thereof made in open town meeting, except that the warrant for the meeting did not state the time when the polls would be opened. Your committee do not deem this a valid or fatal objection. Were it made so it would not only be fatal for Mattapoisett, but also for Rochester, as the warrant calling the meeting in that town contained the same omission, together with an omission of stating whether all the persons to be voted for, should be voted for on one ballot, or at the same time on separate ballots. There is, then, in the opinion of your committee, no valid objection to the proceedings of Mattapoisett up to the time when the votes had been duly declared and recorded.

The first important failure to comply with the requisitions of law, was an omission on the part of the selectmen and town clerk, to "forthwith, make out under their hands, and seal up, in open town meeting, a true transcript of the record of such result, and deliver the same to the town clerk," as required by the fifth section of chapter 311, of the Acts of 1857.* In consequence of this omission, the town clerk, when he met the town clerks of Lakeville and Rochester, on the next day after the election, for the purpose of ascertaining what person, if any, had been elected representative, had no evidence of the vote cast in his town, except a neatly prepared sheet, of large size, on which the result of the balloting had been entered prior to the entry on the book of record, and from which the result had been publicly declared.

The town clerks, at their said meeting, as the committee think, very properly deemed this sheet or memorandum as quite too informal, and as insufficient evidence of the declared and recorded vote of Mattapoisett. They, therefore, adjourned to meet on the day following, for the purpose of procuring legal advice and farther considering their duty in the case. The town clerk of Mattapoisett repaired to New Bedford for such advice, which, as he stated it, was to waive informalities of return, and be governed by the record as made and declared. This advice, not having been submitted in writing, was disregarded, the vote of Mattapoisett was rejected, and a certificate of election given to Mr. King, the sitting member, at the said adjourned meeting of the clerks.

At this adjourned meeting of the town clerks, the said clerk of Mattapoisett had with him and presented a transcript of the record of said town, conformable to the statute in every respect, except that it bore date on that day, it being the second day after the election. This return was rejected by said clerks for the reason that it had not been sealed up in open town meeting, as required by law. Your committee are of the opinion that the said clerks erred in thus rejecting. The spirit of our laws, as well as the decisions of our courts, would authorize the clerks to have received this return, and to have been governed by it in coming to their result.

The duties of clerks of towns composing a representative district are quite similar to those of mayor and aldermen, in making up the result of an election by wards. The law provides that the mayor and aldermen shall give notice to ward officers of any "error or deficiency in the form" of their returns, and the ward officers are required in such case to "make a new and additional

* Substantially, Pub. Stats. chap. 8, § 8.

return, which additional return, whether made upon such notice, or by the officers of any ward without such notice, shall be received by the mayor and aldermen"; and no such "returns shall be rejected, where the whole number of votes given for any officer or *representative* voted for" can be ascertained. See chapter 209, Act of 1852. It is true that this law does not, strictly speaking, apply to the clerks of towns comprising a representative district, or that they are expressly required to give notice of errors in returns, or to seek, and be governed by, amended or additional returns, but such is its spirit.

Chapter 282 of the Acts of 1852,* provides that: "No selectmen of any town in this Commonwealth shall give a certificate of election to any person voted for as a representative to the general court, which certificate shall not be in accordance with the declaration of the vote in open town meeting, at the time when the election so certified took place, under a penalty of three hundred dollars."

The duty of giving certificates of election to representatives has been transferred from selectmen and town clerks to town clerks exclusively, in most cases, under the recent amendment of the Constitution; and there seems to be no good reason why the same penalty should not be applied to the clerks who perform this duty as to selectmen performing the same duty. The spirit of this law would make it alike penal for the clerks to give such certificate, not in accordance with the declaration of the vote in open town meeting, which the clerks in this district seem to have done.

But the town clerks would have been more completely justified in receiving the return in question, although made on the second day after the election, by a decision of the supreme judicial court of this Commonwealth, from which we extract the following: —

"But shall the whole town be disfranchised by reason of the fraud or negligence of their officers? This would be punishing the innocent for the faults of the guilty. It would be more just and more consonant to the genius and spirit of our institutions to inflict severe penalties upon the misconduct, intentional or accidental, of the officers, but to receive the votes whenever they can be ascertained with reasonable certainty. If no return, or an imperfect one be received, let it be supplied or corrected by a reference to the orignal record, if any there be." See 20 Pick. 484.

There was no alleged fraud in the case before your committee, and no dispute as to the correctness of the record of Mattapoisett, and it cannot be doubted that, if the clerks had been governed by

* Substantially Pub. Stats. chap. 8, § 20.

the decision above quoted, the certificate of election would have been given to the petitioner.

Chapter 311 of the Acts of 1857, * provides for meetings of the clerks of towns composing a representative district, to be holden at a place designated and appointed therefor by the county commissioners. The clerks of the district did not comply with this provision of law. Their meeting was holden at the office of the town clerk of Rochester, who is the sitting member, whereas the county commissioners designated and appointed the town house in said town as the place of said meeting. Cases might occur when such failure of the clerks to meet at the place legally designated would be highly objectionable; and in this case it was unjustifiable. The meeting was holden quite near the place designated, and there is no pretence that the result would have been different, had the meeting been at the place appointed by law. The committee simply report this fact as one of the many cases of informality and illegality in the proceedings of town officers, which the committee regret to say have appeared before them in their investigations of this and the former case submitted to them.

In view of the facts and considerations herein set forth, your committee are unanimously of the opinion that the sitting member, Theophilus King, is not entitled to a seat in this house, and that the petitioner, Job T. Tobey, was legally elected a representative, and is entitled thereto.

[The report of the committee was accepted. H. J., 1859, p. 119.]

* Substantially Pub. Stats. chap. 8, §§ 9, 10.

Frederick O. Prince *v.* Oliver R. Clark.

House Document, No. 36. February 3, 1859. Report by Nathaniel Hinckley, *Chairman.*

Double Voting. Where votes are found so folded or adhering together in the ballot-box as to prove, in the honest opinion of the selectmen, double voting, and the selectmen thereupon reject one vote of each set of such double votes, it will be presumed that their judgment and action were correct.

Semble. Where two votes for the same candidate at an election are cast by one qualified voter, one of them will be counted.

The Committee on Elections, to whom was referred the petition of Frederick O. Prince of Winchester, praying for a seat in this house, as a representative from the sixth Middlesex representative district, instead of Oliver R. Clark of said Winchester, the sitting member, submit the following report: Said district is composed of the towns of West Cambridge and Winchester, and is entitled to one representative.

The vote in said district for representative, as declared and recorded at the election in November last, as appeared by evidence, was as follows: —

	West Cambridge.	Winchester.	Total.
Oliver R. Clark, . . .	135	156	291
Frederick O. Prince, . .	164	126	290

By virtue of this record, the certificate of election was given to Mr. Clark. A single vote more for Mr. Prince would have prevented a choice. Two additional votes for him would have entitled him to the certificate of election.

It appeared in evidence, that there were three votes found in the ballot-box, all of which were for Mr. Prince, and all of which were rejected by the selectmen, in counting and making up the result. One of these was admitted by him to have been rightly rejected. The other two, he alleged, were wrongly rejected, and should have been counted. The whole case, therefore, turns upon the justice or injustice, legality or illegality, on the part of the selectmen, of rejecting the votes in question.

The Constitution provides, that "The house of representatives shall be judge of the returns, elections, and qualifications of its own members." Your committee have given the parties in this case a patient hearing, and will endeavor to report the circum-

stances and evidence in the case, with such fullness as to enable the House to judge correctly thereon.

The witnesses examined before the committee were Josiah Hovey, town clerk, Luther R. Symmes, Cephas Church and Samuel M. Rice, selectmen, Charles P. Curtis, Jr., Nathaniel A. Richardson, and the petitioner, all of Winchester.

The polls were opened for the choice of state and other officers, at one o'clock, P. M., and closed at six o'clock, P. M. The voting for representative was on a separate ballot, and the votes were deposited in a box separate from any other votes, and during the balloting, was in the charge of Mr. Church. Mr. Symmes, chairman of the selectmen, had charge of the balloting for state and other officers, and Mr. Rice of the check list.

It was shown and admitted, that more persons voted and were checked on the list, than the whole number for representative, with the addition of the votes in question; but there was no distinct check mark denoting who voted for representative, and, therefore, the check list furnishes no information on that point. Had the check list denoted, separately, those who voted for representative, it might have aided materially in arriving at the truth.

For the purpose of convenience the several rejected votes will be denominated the *Parker* vote, the *torn* vote, and the *folded* vote.

The testimony of Mr. Richardson, who is treasurer and collector of Winchester, was to the effect that he saw a Mr. Parker approach the ballot-box and deposit two votes, and that he (the witness) informed Mr. Rice, who answered that they could tell, for they had just before turned the box. The box was examined, two votes were found for Mr. Prince, and, as before stated, he agrees that one of them was rightly rejected. This rejection seems generally acquiesced in. The fact need not have been reported except for the sake of explaining a disagreement in one particular between the town clerk and one of the selectmen, Mr. Church, which will hereafter appear.

It appeared that the ballot-box was turned and emptied of its contents, for the purpose of assorting and counting the votes, two or three times. It was not stated by any one, positively, how many times. Nor was it positively stated at which turning of the box the torn and folded ballots were found. It appeared to have been at about four or five o'clock. Both parcels were found in one and the same pile, and both by Mr. Church.

The torn and folded votes were each rejected, because of being found in such proximity and connection with other votes as to convince the selectmen, that in each case there had been double

voting. This will account for the use of the plural number in the testimony in regard to them.

The testimony of the witnesses was substantially as follows: —

Testimony of Mr. Church.

The folded votes were first found by me in the pile, after the box had been turned on the table. When I took them up they had the appearance of having been voted by one person. They adhered together. They were folded together when found, which was after about one-third or one-fourth of the pile had been taken up and assorted. They must have been folded closely together before the votes were taken off which had been assorted. I held them up to Mr. Symmes, and said I believed there were two votes or double votes. There was no sign of any opening, except about an eighth of an inch at one corner, where I took hold and drew them apart. I found the second pair, or torn votes, about midway of the pile. There was no separation; they adhered together throughout. My impression is, that the edges conformed throughout, but cannot say positively. I showed them to Mr. Symmes, and said to him, here is another double ballot. We looked at it and I took hold of the edge and separated them; called Mr. Rice's attention to it, and also Mr. Hovey's. Asked Mr. Hovey what he thought of that ballot. He said he had no doubt but what it was put in by one man — that is, both votes. In relation to both the torn and folded votes, witness believes it to be an impossibility in either case, for two persons to have put in these ballots, and for them to have come together as found in the pile. Had no doubt then, and has none now, that in each case, they were deposited by one and the same person.

Testimony of Mr. Rice.

My attention was called to the torn and folded votes by Mr. Church. The torn votes were together, the torn edges corresponding exactly. I gave it as my opinion that they were thrown by one and the same person. The folded votes were not folded square across, but somewhat at an angle. Am not so confident as to these, that one person put them in, but that was my opinion. I stated at the time, as my opinion, that not one time in a million would the votes, if thrown separately, have come together as found. My opinion was the same as to the torn votes, the edges agreed exactly, and showed that they must have been torn together, and had not been separated. Had no doubt at the time, that in both cases there was double voting. Have seen

nothing since to change my mind. Was in favor of throwing out all four of the votes.

Testimony of Mr. Symmes.

There were three votes for Mr. Prince rejected, the Parker vote and two others. The folded votes were found first. [Here the four ballots were exhibited.] Mr. Church picked them up and showed them to me. We were both assorting and counting the representative votes. He said there were two votes stuck together, that one person had thrown them both; that was the substance, perhaps not the exact language. I replied, I thought so; I had no doubt of it. They were laid aside. I came to my conclusion from the appearance of the votes. We were both picking up votes from the same pile, on the second counting or turning of the box, I think. The story of the torn votes is the same. They were picked up by Mr. Church in the same pile, and seemed to adhere closely. Had no doubt, not a shadow of a doubt, that in each case, the votes were cast by one person. He could not place them before the committee, as they then appeared, without paste. They had been kept in the town safe. My mind was made up, that either two or the four should be rejected.

We took legal advice of Mr. Prince, and also of Mr. Curtis. We asked it because we did not know whether the law required that one or both should be discarded. Mr. Curtis replied that he had not looked up the law, but as an off-hand decision he would say that, if we had found that there had been double voting, discard one in each case. The opinion of Mr. Prince was similar.

Testimony of Mr. Hovey.

The selectmen thought upon consultation that two sets of votes were found so placed together that they might have been put in by one person; that is, each of the sets, or in other words, two persons voted double. Mr. Church called on the other selectmen to examine the votes referred to, and when Mr. Rice's attention was called to them, mine was also. One set was partially folded and appeared to have been closely folded. The other set was torn off at the corner, each corresponding, and at a slight angle. They were torn exactly alike and lay exactly over each other. I gave my opinion that they might have been put in, in both cases by different persons, and that they might have come together as found. I should have decided that they were cast by different persons.

This testimony conflicts somewhat with that of Mr. Church, who testifies positively that Mr. Hovey said, in regard to the torn votes, that he had no doubt they were put in by one person. Mr. Hovey is as positive that his remark was in reference to the Parker vote, and not in relation to the torn vote. Be that as it may, no suspicion of intentional misstatement or fraudulent intent rests on either, and one or the other has, doubtless, unintentionally erred in his statement.

To the selectmen belongs the duty of receiving, assorting, counting and declaring the vote and we must necessarily rely mainly upon their testimony. The position and duties of the selectmen, especially in this case that of Mr. Church, enabled him and them to judge more truly than any other person could. The testimony of all of the selectmen is as strong as the nature of the case will admit, and no one imputes to them any intentional error. The petitioner relied strongly on the point that, the votes being found in the ballot-box, the legal presumption was in his favor, and that it devolved on the respondent to prove that they were not legally cast. Admit this position to be rightly taken, then how shall we judge? The selectmen had no doubt. Can we judge better?

The committee have before them the certificate of election of Mr. Clark. That is presumptive evidence of his election, and it devolves on the petitioner to prove that he was not elected. Neither of these assumptions of *prima facie* evidence is controlling, and we must judge according to the evidence.

A similar case to the one before us was decided by the House in 1843, from which we quote as peculiarly applicable to this case, as follows: —

"The evidence to show these facts must of necessity often be, and in this case was, derived from the appearance of the ballots at the time. It is difficult to describe these appearances to the satisfaction of those not eye-witnesses. The committee believe, that much in these cases is to be trusted to the judgment, integrity, and good common sense of the selectmen. It is to be presumed that their judgment is correct, and the burden of proof is upon those who would question the correctness of that judgment. In this case there is not the slightest imputation upon their candor, fairness and deliberation." — *Massachusetts Election Cases* (Cushing, S. & J.), p. 465. *

* [NOTE BY THE EDITORS. This was the case of the town of *Dartmouth* (Cushing, S. and J., p. 465), in which the House held that where three ballots were found in the ballot-box, bearing the name of the same candidate, and so folded and doubled together as to satisfy the selectmen that they were all put into the box by the same person, and the selectmen thereupon rejected two and counted one of them, in the

The testimony of Messrs. Prince and Curtis corroborated that of Mr. Symmes in relation to the legal advice obtained. Mr. Curtis said: Mr. Symmes has stated the matter very fairly. I told him, as a snap judgment, that if there had been double voting, one vote should be discarded in each case. Mr. Prince's testimony on that point was materially the same.

The testimony of Mr. Prince was mostly relative to procuring and separating the ballots, and was substantially as follows: —

He ordered the printing of six hundred, by Mudge & Son, on Monday, the day before election; to be ready at half-past 5 o'clock, P. M. At 5 o'clock he called for them and they were not ready. He hurried the printers, waited as long as he could, and went away with what he could get — about 175 sheets, with three votes on each, or 525. In the evening he undertook to tear them apart with an ivory paper-folder, tearing several at a time, but finding that difficult, cut the remainder apart with scissors.

This testimony was introduced for the purpose of explaining or accounting for the appearance of the *torn vote*. The manner of tearing made the edges rough, and with the haste in doing it, might account for the angular appearance. Perhaps the fact of the ballots being torn as they were, and being so recently from the printing office *when* torn or cut, may in part, at least, account for their adhesion, as testified to by the selectmen.

The testimony in regard to the meeting united in showing that it was orderly, and that there was no confusion.

Your committee, with a single exception, are decidedly of the opinion that the decision and action of the selectmen was right. On the part of one of its members strong doubts are entertained on that point, but nevertheless, they unanimously recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H.J., 1859, p. 241.]

absence of evidence to contradict the conclusion of the selectmen, or to impute any unfairness to them, their action should stand as correct. The authorities hold, in the absence of statutory regulation, that, where two votes are cast by the same person for one candidate for the same office, one vote should be counted and one rejected, as was done by the selectmen in the above case. *State* v. *Pierce*, 35 Wis. 93. *People* v. *Saxton*, 22 N. Y., 309. Case of *Ashfield*, Cushing, S. and J., 583, *McCrary Elections*, § 406. Where a person votes twice at an election, for the same candidate, his first vote should be counted, and his second vote rejected. *People* v. *Holden*, 28 Cal. 123. *Cushing, Law and Pr. of Leg. Assemblies*, § 91.]

In re John Q. A. Griffin.

House Document, No. 291. October 26, 1859. George W. Parmenter of Boston, Nathaniel Hinckley of Barnstable, Augustus L. West of New Bedford, Nathan B. Edwards of Chelmsford, Caleb Cushing of Newburyport, Amos B. Merrill of Boston, and Charles Brimblecom of Barre, Committee of Inquiry. Report by Mr. Merrill.

Eligibility of Member. Acceptance of Office of Clerk of Courts vacates seat. Where a representative, during the recess of the legislature was appointed by the supreme judicial court clerk of that court, of the court of common pleas, and of the county commissioners, for the county of Middlesex, to fill a vacancy, and qualified for, and assumed the duties of that office, although he resigned the office before the legislature reassembled, it was *held*, that under Art. II. of chap. 6 of the Constitution, by the assumption of the office of clerk, he vacated his seat as representative.

The Committee of Inquiry, appointed under an Order passed September 30, to consider and report upon "the right of the sitting member from Malden to a seat in this House," having notified said member of their readiness to hear him, and requested him to appear and present his case, and he having, by letter, declined so to appear, proceeded to make inquiry, as directed, and to consider the subject matter of said Order; and having performed said duty, respectfully submit the following report: The committee have ascertained and report the facts, as follows: —

On the 20th of June last, John Q. A. Griffin of Malden, a duly returned and qualified member of this House, representing the fourth representative district, Middlesex County, while sitting as a member, on the part of this house, of the joint special committee of the legislature, appointed under chapter 7, of the Resolves of 1859, during the recess of the legislature, was, at a term of the supreme judicial court held at Boston, for the counties of Suffolk and Nantucket, appointed by said court clerk of the supreme judicial court, court of common pleas, and of the county commissioners of the county of Middlesex, to fill a vacancy occasioned by the resignation of Seth Ames, Esq., then clerk, to take effect June 24, 1859, and to continue until the annual election in November, or until the choice or appointment of another. On June 24, Mr. Griffin took and subscribed the required oaths before the chief justice of the supreme judicial court, at Boston; executed to the treasurer of the county of Middlesex the required bond, and entered on the duties of clerk of the court of common pleas, then sitting at Cambridge, and of the supreme judicial court, for Mid-

dlesex County. He performed the duties of clerk of the court of common pleas until July 1, when said court ended, and of the supreme judicial court until September 1, when his term of office expired by his resignation, and the appointment of James Dana, Esq., as clerk, in his stead. During said periods, Mr. Griffin, as clerk of said respective courts, entered on the records of said courts decrees and judgments, taxed costs, issued out of the clerk's offices thereof, respectively, writs of execution and other writs, signed by him as clerk, and took, and is entitled to have, the fees and emoluments payable to the clerk in each of said courts. After June 24, said joint committee of the legislature continued its sittings until September 6, but Mr. Griffin performed no duty therein after July 11, on which day he declined to serve longer as a member of said committee.

The committee find and report, that Mr. Griffin, while a member of this house, sitting and acting as member of the house, on a joint legislative committee authorized by law to sit in the recess, was appointed to the office of clerk of the judicial courts of the county of Middlesex; that he accepted said office; was duly qualified; entered on and performed the duties of clerk of the supreme judicial court and court of common pleas; and that he resigned said office of clerk in the recess, and another was appointed in his place.

The committee find the constitutional provision applicable to the case, in chapter 6, article 2, of the Constitution; and it is as follows: —

"No person holding the office of clerk of the supreme judicial court or clerk of the inferior court of common pleas shall at the same time have a seat in the house of representatives, but his being chosen or appointed to, and accepting the same shall operate as a resignation of his seat in the house of representatives, and the place so vacated shall be filled up."

I. The committee have first inquired what courts are intended in this article.

Neither the supreme judicial court, or court of common pleas, as now or late established, nor any other courts of these specific names existed at the time of the adoption of the Constitution. The framers of that instrument could not have foreseen by what names or styles, or with what precise divisions of power, future legislatures would "erect and constitute courts and judicatories" under the authority given them by the Constitution in chapter 1, article 3. It is the object of a Constitution to establish general principles, and ordain general rules, which shall be constant, and

of perpetual obligation. It is therefore plain, that the terms "supreme judicial court" and "inferior court of common pleas" are used in the Constitution as a general description of grades of courts, to be established under it, and that therefore they cannot be limited to courts of these particular names or organizations, either then existing or subsequently established. Otherwise, what was intended for a permanent rule and perpetual prohibition to the legislature would be a rule and prohibition only at the will of the legislature, and would prevail, be dispensed with and again restored, according as the legislature preserved, changed, or restored the names and forms of courts. The subject of these descriptive terms must be sought in the essential qualities of courts, well understood by the framers of the Constitution, permanent in their nature, and intended by the Constitution to be kept so, under whatever names or forms the courts might be, from time to time, established.

When the Constitution was framed, there existed two provincial common law courts of record, in which was vested the power to hear and determine *common pleas* or actions at common law, namely: the superior court, and the inferior court of common pleas. The former was the highest *judicial* court of the province, or new state, having in addition to its jurisdiction in civil cases, supreme criminal jurisdiction as court of assize and general jail delivery. It had as full jurisdiction in the province, as the courts of king's bench, common pleas and exchequer had in England. It was the *higher* court of common pleas, because in addition to its own original jurisdiction it had jurisdiction and control on appeal, by review, writ of error and otherwise, of all actions and trials in the *lower* courts of common pleas. Anc. Chart. 330.

The latter consisted of courts in each county which had jurisdiction of all civil actions in the county, triable at common law. Being subject to the higher and final jurisdiction of the superior court, which might control its proceedings, it was the inferior court of common pleas. Anc. Chart. 329.

To the superior court of the province succeeded, by St. 1781, chap. 17, the supreme judicial court, which, established by St. 1782, chap. 9, and continued, remodelled, and variously altered by subsequent statutes, has hitherto remained and now is the highest common law court of record of the Commonwealth, with like jurisdiction, civil and criminal, and like supervision and control of inferior courts as the provincial superior court had.

To the inferior courts of common pleas have succeeded (1782, chap. 11) courts of common pleas within each county; (1811, chap. 33) circuit courts of common pleas; (1813, chap. 173) in Suffolk County, the Boston court of common pleas; (1820, chap.

79) the court of common pleas for the Commonwealth; (1855, chap. 449) in Suffolk County, the superior court for the county of Suffolk; and (1859, chap. 196) "the superior court." These successors, in all their shapes and changes, have preserved the original and essential qualities of the provincial inferior courts of common pleas intended to be perpetuated by the Constitution, and have remained, and now are common law courts of record, with jurisdiction to hear and determine actions at law, subject to the higher jurisdiction, supervision and control of the supreme judicial court of their trials and proceedings, by appeal, exceptions, review, error and other process, in like manner as the provincial inferior courts were subject to the provincial superior courts.

It seems then to be the intent of the Constitution to perpetuate the essential qualities and peculiar relation of control and subordination which existed in and between the judicial courts, when the Constitution was formed, by two classes of courts, one the highest common law court in the Commonwealth, with power to control the proceedings in the lower courts, which is described therein by the words "supreme judicial court;" and the other the common law courts having jurisdiction to try actions at law, inferior to and subject to supervision and control by the higher tribunal, which are comprehended and described in the Constitution by the words "inferior court of common pleas."

Such appears to be the opinion of the framers of the Constitution, who refer to these courts by the terms, "the superior court" and "the inferior court."—Jour. Conv. 1780, pp. 41, 42, 43, 81, 91, 103-4, 116. If the term "inferior court of common pleas" had not included the several inferior courts established before 1820, it is to be supposed the convention which met in that year to revise the Constitution would have discovered and remedied the effect; but Mr. Webster, to whom this article was referred, and who reported article 11 of the amendments, did not suggest a difficulty or report a change. Jour. Conv. 1820, pp. 65, 66.

The committee, therefore, have no hesitation in finding that the supreme judicial court and court of common pleas as established when Mr. Griffin was appointed, are within the meaning of the article of the Constitution prescribing the rule in this case.

II. Each of said courts, had, inseparable from it, the office of clerk thereof.

The several Acts establishing each of said courts, and the courts which they succeeded, establish them as courts of law, and provide that each shall have a clerk, that each shall have power to issue writs, and that such writs shall issue out of the clerk's office, and be signed by the clerk of the court.

Anc. Chart., 222, 329, 330; Stat. 1782, ch. 9, 11; 1811, ch. 33; 1813, ch. 173; 1820, ch. 79. R. S. ch. 81, 82, Act of Amend., ch. 82, §35, ch. 90, §§ 1, 2, 6.

Further, the office is made inseparable from these courts by chapter 6, article 5, of the Constitution, which provides that all writs, issuing out of the clerk's office in any of the courts of law, shall be signed by the clerk of such court; so that an Act of the legislature even cannot dispense with the office in these common law courts, the essential qualities of which, as they existed at the formation of the Constitution, are adopted and perpetuated by it.

Hence is it that legislatures who have desired to unite in one person the several offices of clerk of the several courts, have never abolished these offices, but have provided that the clerk of one court should be also the clerk of another, or that one person should be the clerk of *all* the judicial courts in the county, an expression clearly distributive in meaning, and signifying clerk of each and every of them.

Thus, statute 1796, chapter 95, provides that the clerk of the common pleas for the county of Suffolk, shall be clerk of the supreme judicial court for the counties of Suffolk and Nantucket.

Statute 1811, ch. 8, "for the appointment of clerks of the court in the several counties," provides for the appointment by the governor and council, of one person in each county, "who shall be clerk of all the courts holden in the same county, under the authority of this Commonwealth, and who shall do and perform all the duties, services, etc., which he, as clerk of either of said courts, ought by law to do and perform."

Statute 1830, ch. 129, provides for the appointment by the justices of the supreme judicial court of one or more persons in each county, "who shall be clerk of the courts in the several counties, as herein provided for, who shall hold their office for five years;" that the clerks thus appointed shall have the custody of the records remaining in the respective offices of the clerks of the supreme judicial court, court of common pleas, and county commissioners, and "shall be clerks of all the courts aforesaid," "holden in their respective counties," and "do and perform all the duties, services, etc., which they, as clerks of either of said courts ought by law to do and perform, and shall be liable to all the penalties, and subject to all the restrictions as now by law provided;" and sect. 4 of the chapter fixes the respective salaries of each by the designation of "clerk of the county."

The provisions of this statute are incorporated into chap. 88 of the Revised Statutes, which provides in like manner for the appointment, by the justices of the supreme judicial court, of "one or

more persons in each county, to be clerks of all the courts which shall be held in their respective counties," that they "shall hold their offices for five years," and fixes their salaries under the description, "the clerk of the county."

It is evident that these designations, "clerk of all courts," "clerk of the county," "office or offices of clerk," are used only for the sake of brevity in describing the mode of appointment and compensation, and have no significance beyond describing the offices of clerk of each and every of said courts.

Statute 1856, ch. 173, §2,* provides for the choice for the term of five years, by the legal voters of the several counties, except Suffolk, by ballot, for their respective counties, of "a clerk, who shall act as clerk of the supreme judicial court and court of common pleas, within and for the county for which he shall be chosen," and by the legal voters of Suffolk County, by ballot, for said county, of "a clerk of the supreme judicial court, a clerk of the superior court, and a clerk of the municipal court of said county;" and section 9,† under which Mr. Griffin was appointed, provides that "in case a vacancy shall from any cause occur in the office of any of the clerks of courts herein before mentioned, the judges of the said several courts, or a majority of the same, may appoint a suitable person to fill such office until the annual election in November next thereafter, or until another is chosen or appointed in his stead."

The use of the words "clerk," "clerks of courts," "such office," "said office," is not distinguishable from the use of like expressions in previous statutes before noticed, and they cannot be construed as establishing a new and distinct office, nor the office of clerk of each of said courts. Such construction is precluded by the language of the constitutional provision executed by this Act. Amendment of the Constitution, art. 19, declares that the legislature shall prescribe, by general law, for the election of "clerks of courts" by the people of the several counties for such term of office as the legislature shall prescribe. It is obvious that the election is to the offices of clerk of the several courts.

The words, "who shall *act as* clerk of the supreme judicial court and court of common pleas," in an Act entitled "An Act concerning the election of clerks of courts," appear susceptible of but one meaning, namely, "who shall *be* clerk of the supreme judicial court and court of common pleas." The constitutional provision, above cited, and the subsequent statute of 1857, chapter 1, which declares "that the clerks of the supreme judicial court and court of common

* See Pub. Stats. chap. 10, § 3. † See Pub. Stats. chap. 159, § 7.

pleas shall be hereafter clerks of the county commissioners for their counties," seem to be conclusive of the question.

The committee are therefore of opinion, that an appointment to the office of clerk, under the provisions of St. 1856, ch. 173, § 9, is an appointment to the office of clerk of the supreme judicial court, and to the office of clerk of the court of common pleas.

III. It will be noticed that section 9, above cited, provides that in case of a vacancy "in the office of the clerks of court herein before mentioned, the judges of the several courts, or a majority of the same, may appoint a suitable person to fill such office."

To give a construction to the words "judges of the several courts," it must be observed than when this Act was passed, the judges of the supreme judicial court had the power to appoint the clerks of all the courts, except the superior court of the county of Suffolk, and the municipal court of the city of Boston; that the judges of the superior court had the power to appoint the clerks of the two last named courts; and that said judges, respectively, had the like powers of appointment to fill vacancies in said offices. R. S., ch. 88; St. 1855, ch. 449, §§ 2, 16; 1843, ch. 9, § 2.

The provisions of this section (§ 9) not being demanded to carry into effect amendment of Constitution, art. 19, which is fully executed by other sections of the chapter, must be construed in connection with other laws relating to the same subject. No intention to repeal those laws is declared; the power given is discretionary, and may be accumulative only. Full effect can be given to all provisions of law relating to this subject-matter by construing the words "judges of the several courts" distributively, as descriptive of the respective judges who then had the appointing power. The committee adopt this as the reasonable construction. The question was necessarily passed on by the supreme judicial court in making the appointments of Mr. Griffin and Mr. Dana, and we have their determination of it in the certificates of appointment, copies of which are hereto annexed.

Mr. Griffin's appointment was then a valid appointment.

IV. The provision of the Constitution applicable to the facts, as above established, admits, in the judgment of the committee, of no question as to what is their legal effect. It plainly prohibits any person holding the office of clerk from being admitted to a seat in this house, and it as plainly prohibits any person, who has been admitted to and holds a seat here, from retaining such seat after he has accepted an appointment to the office of clerk. The fact of appointment and acceptance alone is declared to operate a resignation and vacate his place. Investiture as clerk shall divest him

of membership. This is the plain meaning of the Constitution, and so it has been often resolved by this house.

In 1818, in Stearns' case (Rep. Elec. Ca., Cushing, S. & J., 217), it appearing that a qualified member of the house had, in the recess, accepted the office of University Professor of Law in Harvard College, the house determined, on the report of an able committee, by a vote of 71 to 12, "that, by the acceptance of the office of University Professor of Law, the seat of Asahel Stearns, Esq., in the house of representatives, became vacated; and that notice thereof be sent to the town of Charlestown, to fill up the vacancy, if the inhabitants thereof see fit so to do."

In 1828, in Adams' case (Rep. Elec. Ca., Cushing, S. & J., 251), it being proved that a qualified member had, from the close of the first session to the commencement of the second session, in fact performed the duties of a deputy collector of the customs under the United States, there being no evidence of an appointment to said office, the house determined, on a direct vote of 88 to 71, and on a motion to reconsider by a vote of 126 to 75, "that the acts and doings of Mr. Adams are *prima facie* evidence that from June last to the third day of January last, inclusive, he had held the office of deputy collector of the district of Marblehead and Lynn, and that holding said office under the authority of the United States is incompatible with a right to a seat; and they do accordingly report, that William B. Adams of Marblehead, is not entitled to a seat in this House."

A motion, directing the committee on the pay roll to make up the pay of Mr. Adams, for his travel and attendance as a member, being made and considered, was decided in the negative.

At a subsequent legislature, January 14, 1831, Mr. Adams petitioned for an allowance of pay, as a member, until his seat was vacated. The committee on elections reported a Resolve in his favor, which was rejected by the house.

The resignation of an office which has been once accepted and has wrought thereby an exclusion, inasmuch as it does not alter the facts of appointment and acceptance, cannot remove the legal consequence fixed by the Constitution. Thus, while a distinction has been made between ineligibility and disqualification before a member elect has been admitted to a seat, and it has been held that he may resign a disqualifying office and be admitted, it is further held that no such distinction exists in the case of a member once seated, and who afterwards accepts such office, but that thereupon his seat is vacated. Cush. Law and Prac., Legis. Ass., par. 78, p. 31, par. 478, p. 195.

The requirement of the Constitution is, "that the place so vacated shall be filled up." As this can be done only by an election by order of the House, if the vacancy occurs in the recess, it becomes its duty, when in session, upon the facts being ascertained, to make the necessary order therefor.

The committee are therefore of opinion and do report that, by the acceptance of the office of clerk of the supreme judicial court, court of common pleas, and of the county commissioners of the county of Middlesex, the seat of John Q. A. Griffin, Esq., in the House of Representatives, became vacated; and that notice thereof be sent to the town of Malden, constituting the fourth representative district of Middlesex County, to fill up the vacancy, if the inhabitants thereof see fit so to do.

[The report of the committee was rejected by the house by a vote of 59 yeas to 69 nays. Reconsideration of the vote was afterwards refused by a vote of 78 yeas to 94 nays. Notwithstanding the action of the house, the report is published by the editors as correct, and valuable as a precedent.]

SENATE — 1860.

William H. Knowlton *v.* Thomas Rice.

Hon. Alvin Cook, Hon. William Claflin, Hon. Thomas P. Rich, Hon. Dexter F. Parker and Hon. George L. Davis, *Special Committee.*

Senate Document, No. 70. February 21, 1860. Report by Messrs. Claflin, Parker and Davis, Messrs. Cook and Rich dissenting.

Vacancy in Senate. Mode of filling. Where a vacancy occurred in the Senate by resignation to be filled under the former provision of the Constitution (Art. IV., sect. 2, chap. 1) that the Senate and House should take the names of such persons as should be found to have received the highest number of votes in the district, and not elected, amounting to twice the number of senators wanted, if there be so many voted for, and out of these make an election, it was *held* that it was proper to omit from the list of such names a candidate, who, although eligible at the time of the general election, had become ineligible; and to add to such list the names of persons who received the same number of votes although by such addition, the list will contain more than twice the number of senators wanted.

Votes for ineligible candidates. Votes cast in a convention of Senate and House for the election of a senator, for a person not constitutionally eligible to election, cannot be regarded as blanks, so as to elect the person receiving the next highest number of votes.

The Special Committee on Elections, to whom was referred the petition of William H. Knowlton of Shrewsbury, praying that he may be declared entitled to the seat now occupied by Thomas Rice, who was elected in joint convention January 25th, beg leave to report that agreeably to the duties assigned them, they met on Wednesday, February 16th, to hear the parties in the case, at which time the chairman of the committee informed us that the petitioner would not appear, but would rest his case on the reasons set forth in his petition; and we will here add that no official notice has ever been served on Mr. Rice, informing him that the petitioner claims his seat, and he did not appear before us. We may, therefore, say that the case is really submitted upon an agreed statement of facts by both parties, to wit: that, by a resignation of a senator, a vacancy existed in the Worcester east senatorial district; that a committee of the senate, to select the

constitutional candidates to be voted for to fill the vacancy, reported that William H. Knowlton was one of said candidates; that Horace Faulkner, of Bolton, would have been the second, but he was ineligible to the office, having removed from the district, and therefore they reported as the next highest candidate voted for and not elected, Thomas Rice and Jeduthan Dadmun, they having the same number of votes, viz., two each; which report was unanimously accepted, and, as the result of it, in a joint convention Thomas Rice was chosen senator, he receiving 111 votes of the 219 cast. The petitioner now claims that his and Horace Faulkner's names only should have been returned, and that Thomas Rice was not eligible as a candidate; therefore the votes cast for him were thrown away, and he (the petitioner) was elected by receivlng 106 votes out of the 219 cast, rejecting the 111 cast for Rice, which were null and void and ought not to have been counted; but that the petitioner, receiving 106 votes, should have been declared to have been elected, and therefore he claims and asks the senate to give him the seat now held by said Rice.

Such, in brief, is the prayer of the petitioner; and while, by the recently proposed amendment to the Constitution, which has now been adopted by the legislature, and will undoubtedly be approved of by the people, these vacancies in future will be filled by the people themselves, still we admit that though another such case may not ever occur, that the subject should be most carefully investigated; and if the petitioner has been deprived of his rights, the senate, as it is in their power to do, should be prompt and ready to restore them. Impressed with these views, we have examined critically the records of the senate from the establishment of our Constitution to the present time, in regard to the manner of the senate's selecting constitutional candidates to fill any vacancies that might occur, the method of electing them, and the power of the legislature over the entire matter of vacancies in the senate. By reference to the senate Journal, October 26, 1780, it will be seen that they voted that in filling "vacancies in the senate both houses vote in one room in order to render the elections most harmonious," and that is the custom to-day; but in regard to the selection of candidates for said vacancies, we find, senate Journal, page 7, 1781-82, a message is received from the house saying that they have

"*Ordered*, That Mr. Lowell and Mr. Fessenden be a committee, with such as the honorable senate shall join, to examine and make report who are candidates to fill up the vacancies in the honorable senate, and the senate concurs, and A. E. Fuller is joined.

This is the first and the only case in which the senate allowed the house to join them in selecting constitutional candidates to fill the vacancies that occurred in their own body; so that for seventy-nine years this power has been exercised by the senate solely and alone, so that to-day its right to do so and its power to declare who such constitutional candidates are, cannot be disputed. Now, let us ask who are the candidates to be? We answer, "such persons as shall be found to have the highest number of votes in such district, and not elected, amounting to twice the number wanting, if there be so many voted for." (Sect. 2d, art. 4th, Const.) Now, supposing there are two vacancies and five persons have the highest number, what is to be done? Shall five names be reported, or shall the two who are tied be rejected, and thus only three names be returned? Happily for us, this point was settled in the early days of our Constitution. Turn to Senate Journal, page 5, 1794, and it will be seen that Cumberland County (now in Maine) made no choice by the people, and two vacancies therefore existed, and the senate reported "that the constitutional candidates are"

Daniel Mitchell, who had	456 votes.
Wm. Widgey, ...	443 "
Stephen Longfellow, ...	281 "
Joseph Thacher, ...	245 "
John Cushing, ...	245 "

which report was accepted, and in joint convention William Widgey and Stephen Longfellow were elected, though Mitchell had the most votes at the hands of the people. So also in 1848, George P. Bigelow of Suffolk resigned his seat in the senate, March 27th, and Messrs. Eustis, Blake and Bradley were appointed a committee to report the constitutional candidates to fill the vacancy, and March 30th (Senate Journal, page 430) they reported "that

James Cheever had	2,963 votes.
John Prince, ...	2,953 "
Isaac Adams, ...	2,953 "

and they are the constitutional candidates." The report (Senate Document 101, 1848) was accepted, then reconsidered, laid on the table, and April 4th adopted; and in joint convention Isaac Adams was chosen, though he had, in the popular election, less votes than Cheever. In 1857 Hon. James Robinson resigned his seat as a senator from Berkshire, and the committee to select constitutional candidates reported that James Bowerman had 1,471 votes, and three other persons had one each, all of whose names

they reported, which was unanimously accepted, acted on in convention, and James Bowerman was chosen. These cases are rare of equality of votes, the first occurring in 1784, when the two constitutional candidates had ten votes each; the next case in 1785 (Senate Journal, page 4), when there were four vacancies in Hampshire County, and of the eight constitutional candidates two had 265 each, and the others 305, 160, 326, 132, 170 and 171 each, and those having 326, 170, 305, and one of those with 265 votes, were elected in joint convention. Aside from these two cases and the three cited before, we believe that no other case of this nature has occurred, as regards candidates for vacancies, while from 1780 to 1857, of all the senators chosen in that time, but twenty-three cases have occurred that any two have had the same number of votes. We have mentioned these facts, and cited these early and later precedents, to show (what may be denied) that if Faulkner was not eligible and could not be returned as one of the constitutional candidates, that the senate did right in reporting three names for one vacancy, because it was not only a common-sense interpretation of the Constitution, but it was a course sanctioned by precedents of the early and more recent times of our legislative history. We now come to the main point relied on by the petitioner as entitling him to Mr. Rice's seat, viz., that Horace Faulkner of Bolton should have been returned (he having five votes) as one of the candidates with the petitioner, he being, when the last State election had closed, one of the two highest candidates not elected, and as he was not returned, Thomas Rice was not a constitutional candidate, he having but two votes; therefore all the votes given for Rice in the joint convention were thrown away, and consequently the 106 votes cast for the petitioner did elect him, and it should have been so declared in joint convention. This assumption of the petitioner raises two points for discussion and deliberation: first, are votes thrown in a joint convention for a person qualified to be a senator by age, citizenship and residence, to be counted as blanks because his opponents deny that he is constitutionally eligible to the place? and second, is a person who is eligible on the day of election as one of the constitutional candidates, in case a vacancy occurs, to be always considered eligible, despite any circumstance that may occur after said election, as affecting his character, citizenship or residence? Let us first examine the question of the right of a legislative body to reject *bona fide* votes given in joint convention.

This question was mooted in the house of representatives in

1843 (see House Journal, pages 131, 321, 403), and on motion of Kellogg of Pittsfield, it was referred to the committee on elections, consisting of Park of Boston, Russell of West Cambridge, Thomas of Charlestown, Kellogg of Pittsfield, Williams of Easton, and Lewis of Hingham, and in their report on the subject (Mass. Election Cases, Cushing, S. & J. 496) they declare that in such conventions all votes are to be counted, and are to be considered as being an expression of the electors' dislike to the other persons voted for, and consequently a person, to be elected to any office in a joint convention, should have a majority of all the votes cast. Two of the committee, Russell and Thomas, dissented from this report, but they say, "As a general principle, that all votes cast at any election by legal voters must be counted, the undersigned readily admit," but as the two reports were not acted on, we can establish no precedent from that case, except so far as the names of Walley, Park and Kellogg can give weight to the position that we are now to contend for. If we turn from our State records to Congress, we shall find (Contested Elections in Congress, page 681, *Washburn* v. *Ripley*) that all ballots are to be counted, and if from those we turn to English precedents, we shall find that the rejection of the votes thrown for Rice cannot be justified for a moment, even though he might be ineligible, so that if he is declared not to be constitutionally eligible, Knowlton cannot be declared to be elected, but the seat is vacated, and a new election must take place.

Rogers, in his Law and Practice of Elections, says: "The principle upon which courts of law have acted in such cases (viz., votes thrown for ineligible candidates) is broad and uniform, and is thus laid down by Lord Ellenborough (*R.* v. *Hawkins*, 10 East, 211), 'The general proposition that votes given for a candidate after notice of his being ineligible, are to be considered the same as if the person had not voted at all, is supported by the case of the *Queen* v. *Boscawen*, E. T. 13 Anne; the *King* v. *Withers*, E. T. G. 2; *Taylor* v. *Mayor of Bath*, M. 15, G. 2;'" all of which are cited in Cooper, 537, in *King* v. *Manly*. Now, let it be remarked that in the Boscawen case it was a *tie* vote, and he was proved to be *notoriously* ineligible, and Roberts was seated. In Withers case there were but eleven votes in the borough, *five* only voted, six refused to vote, and of course Withers was declared elected. In Taylor's case Rigg had 14, Taylor 13, and Kingston 1, and Lord Chief Justice Lee told the jury "if they were satisfied that the electors had notice of Rigg's disqualification, they must seat Taylor," and they did. So in *Claridge* v. *Evelyn* (5 B. & A., 81),

the person voted for was an infant, and notoriously ineligible, and the same was the fact in the *Cockermouth* case (18 Journ., 673), and also in the *Flintshire* case (1 Peckwell, 526). Other cases might be cited, but we have given enough to show that by the judicially established rules of Parliament and courts, the disqualification of the party must be a matter of public notoriety, as in the *Fife* case, 1st Luders, 455; have been established by law, as in 2d Southworth, 1st Clifford, 130; been publicly notified to the electors, as in the *Belfast* case (Fitzherbert and Falconer, 603); or been declared by eminent counsel, as in *2d Canterbury* (Clifford, 353); but if these steps were not taken, votes thrown for the person must be counted, as per decision of court in *R.* v. *Bridge* (1 M. & S., 76). Now take each and every one of these decisions as to the rejection of votes cast for ineligible candidates, and ask the question, will a single one of the rules laid down in them apply to the case of the elector who voted for Mr. Rice? We unhesitatingly answer, no. That he was of age, had resided in the State five years, was a resident of the district for which he was chosen at the time of his election, had no civil disabilities resting upon him, held no offices incompatible with that of senator, even the petitioner himself does not deny; so that every presumption of eligibility, and the declaration of the only tribunal that has a constitutional right to pronounce judgment in the case, was in his favor. Now let us ask *who* had declared to the electors in this case that Mr. Rice not only could be, but was, a constitutional candidate for the office of senator? We answer, the only branch of the government of the State that for seventy-nine years has claimed, exercised or possessed the right to do so, viz., the Senate of Massachusetts.

The report that said he was a constitutional candidate was adopted unanimously by that body, without even one word of dissent, and their judgment was affirmed, after full discussion, by both branches of the legislature, who, in convention, by a vote of 113 out of 219, declared that they did not want William H. Knowlton for senator, but by a vote of 110 out of 219, did declare that they believed Thomas Rice to be a constitutional candidate; that they wished him for a senator, and declared him elected, thus making *twice* that the petitioner has been refused the place he now asks for, viz., once by the people of his own district, by fourteen hundred votes, and once by a joint convention of the representatives of the people of the whole State. Surely if Mr. Rice is not entitled to his seat, Mr. Knowlton cannot, by any rule of law, or in equity or justice, have a title to it. Does he deny that Mr. Rice

was not brought forward in good faith by the senate as a constitutional candidate, and voted for as such? The petitioner does not and dares not affirm this; he does not even charge any civil or legal disqualification in the sitting senator, yet he contends that every vote thrown for Thomas Rice was a nullity, and therefore *he* is elected.

No legislative body calling itself constitutional ever indorsed such a monstrous proposition, save that House of Commons that gave Wilkes' seat to Luttrell, an act so subversive of even English liberties, that a succeeding House of Commons, in 1781, expunged the record of the vote from its journals. Is republican Massachusetts to imitate an example set them by the servile courtiers of George III? Does the petitioner covet the honor, and is he to be the Luttrell of the Senate? If so, well may the people pray for another Junius.

Let us now examine the second proposition of the petitioner, viz , that as Mr. Faulkner was voted for on election day and was made a constitutional candidate by the electors of that district at that time, the Senate must still consider him as a candidate even though they know he is not eligible if he should happen to be elected. The fallacy of this proposition hardly deserves an argument, and its absurdity can be shown in a sentence. Suppose (as was formerly the case) Worcester County could elect on a single ticket four senators, but by operation of the majority rule, there being three parties in the field, no choice was made, but four had 500 votes, four 499, and four others 498. In this state of things, on the eve of the election the eight having 500 and 499 votes are the constitutional candidates to fill the vacancy; but before the legislature meets, three of the highest candidates remove from the State and cannot be found, two are convicted of infamous offences, three accept offices that disqualify them for being senator. Must all those men under that state of things be reported and voted for as constitutionl candidates when every one of them is known to be ineligible? If so, we ask who will be elected, for the petitioner contends that votes thrown for ineligible candidates are votes thrown away. If this doctrine be true, who is to fill the vacancies? Who is to claim the right to the seats on the same ground that the petitioner rests his claim to Mr. Rice's seat? The result would be, if the petitioner's doctrine were true, that the county would have no senators at all, and would be practically disfranchised. Such a state of affairs could not be even supposed, and all must admit that if by any reason, by death or otherwise, one of those who were the constitutional candidates on the day after election should

afterwards become ineligible to the office of senator, one of those having the smaller number of votes must be taken.

This is also the voice of the Massachusetts General Court. At the State election in 1852 Essex County failed to elect its five senators under the majority rule, and on the day after the election the constitutional candidates were Albert Currier, who had 8,456 votes; Dan Weed, 5,827; James M. Sargeant, 8,444; C. D. Huckings, 7,961; Micajah Lunt, 7,714; Thomas Wright, 7,532; Henry Russell, 7,519; Alfred Abbot, 7,597; N. S. Hoar, 7,390; Elisha Mack, 8,113. The legislature met in January. A committee of the senate reported the above names as the constitutional candidates to fill said vacancies, sent them to the house, and January 10th both branches met in convention to fill the vacancies; and before proceeding to vote, the question was asked by Gen. Butler of Lowell, whether the candidates heretofore reported for the district of Essex were the constitutional candidates. (Senate Journal, 1853, page 20.) It then appeared that Elisha Mack had been dead for some time. What did the convention do? Vote for a dead man, because he was a constitutional candidate on the day of the State election? Not at all; the convention was dissolved, the report was recommitted, and the same day the senate committee report "that they have ascertained that Elisha Mack, one of the ten persons named as having the highest number of votes in the district of Essex, was dead, and that Dan Weed, Jr., has the next highest number (some 2,800) of votes for senator." After the person named in their former report, and this report was accepted, his name was reported to the joint convention, he was voted for and received the same number of votes as did five others,—viz., 124, while five others received 154. This precedent, so recent and so common-sense like, decides the case of Faulkner, and as Elisha Mack died a bodily death, prior to the time that he could be elected a senator, and even ceased to be a constitutional candidate, so Horace Faulkner, by removing from Bolton to Lynn, became in the eyes of the law a dead man, and he could not be a constitutional candidate for senator, because if elected he could not take his seat, because the Constitution declares that every senator, when he is chosen, shall be an inhabitant of the district that he is chosen to represent. (Art. 22, amendment to Constitution.) Therefore Thomas Rice was rightfully reported as one of the constitutional candidates, and his election is legal, valid and constitutional. We might go further and assert that as he possesses every requisite qualification for senator, the fact of a joint convention electing him, by the assent of the senate he could hold

his seat, as in case of the Berkshire senators (Sen. Jour., 1795, p. 39, 40), where the legislature in convention "proceeded to the election at large, no particular candidates being named, and made choice of Hon. John Bacon and Thompson J. Skinner." Their seats were never contested, because in their election the will of the people was carried out, and their sentiments and opinions on public policy were represented by them. But we need no such exceptional case to sustain the action of the legislature in electing Thomas Rice to his seat, for its right to do so is supported by reason, usage and practice, and is in perfect keeping with the spirit of our Constitution and the equity of our laws. We therefore, for the reasons herewith given, report that the petitioner have leave to withdraw.

[A minority report was made by Hon. Alvin Cook and Hon. Thomas P. Rich, but the majority report was accepted by the Senate (S. J. 1860, pp. 423, 424) and Mr. Rice was confirmed in his seat.]

HOUSE—COMMITTEE ON ELECTIONS, 1860.

Messrs. GUSTAVUS ATTWILL of Lynn, *Chairman;* RICHARD BLISS of Springfield, JAMES H. BARKER of Milford, HIRAM A. PRATT of Easton, ABIJAH ELLIS of Boston, WARREN ORDWAY of Bradford, and MERRITT NASH of Abington.

NICHOLAS J. BEAN *v.* JOHN C. TUCKER.

House Document, No. 25. January 24, 1860. Report by GUSTAVUS ATTWILL, *Chairman.*

Counting Votes. Recount by Ward Officers after Exposure of Ballots entitled to no Weight. Where the votes were counted every hour during the election by the warden, who did not submit every parcel of votes to the ward clerk for recount, and did not do the figuring, but left it entirely with the clerk to enter upon the record the number counted in the different parcels, and after the polls closed took the votes home, leaving them in a room with several persons for ten minutes while he was away, and afterwards tying them up in bundles and putting them in a basket, and taking the basket to a store, where it was left twenty minutes, and afterwards taking it home, and an hour later at home, in presence of some of the ward officers and other persons, recounting the votes for representative, — the recount changing the result and showing that the petitioner was elected, — it was *held*, although a recount by the committee confirmed the second count by the warden, — the first count and declaration at the polls must stand as the true result, and the petitioner was given leave to withdraw.

The Committee on Elections, to whom was referred the petition of Nicholas J. Bean, controverting the right to a seat in this house of John C. Tucker, would report as follows: The petitioner represents that John C. Tucker, of ward three, in the city of Boston, to whom a certificate of election from that ward to this house was given, was not legally elected, and is not entitled to the seat he occupies; that the said Bean received a plurality of votes over the said John C. Tucker, and was entitled to a certificate of election.

The facts relied upon to sustain the allegations contained in the aforesaid petition were as follows: —

That a mistake was made in the count at the election on the 8th of November, as declared at the close of the polls; and that a new count was requested, and was had at the house of the warden, at which count it was found that the petitioner had a plurality of eight votes over John C. Tucker.

The committee do not note upon the earlier proceedings of the election in ward three, except to say, from evidence, that it appeared conclusively that the proceedings in regard to the count of votes were done in a loose and careless manner, although as usually done. A count of votes was made about every hour in the day.

The warden did not submit every parcel of votes for a recount to the clerk. Also it appeared that the warden did not do his own figuring, but left it entirely with the clerk to enter the number counted in the different piles during the day upon the record. It was shown in evidence that in the different counts announced during the day, John C. Tucker was invariably ahead. It was thought by the friends of Mr. Bean that a reserve which was brought up at nearly the close of the polls was more than enough to overcome the small plurality before announced for Mr. Tucker. On this supposition the friends of Mr. Bean requested a new count after the vote was declared, which was not acceded to at the time, but was had at the warden's house in the evening. It seems that a custom prevails in Boston of preserving votes by the warden for the purpose of a recount, if ever necessary, or for some other purpose not known to the committee.

For the history of the transfer of the votes to the house of the warden, and the count in the evening, the committee would here introduce the testimony of the warden in regard to this matter: —

After each count, passed votes into the drawer; took the votes home that evening; after polls were closed and result declared, went up stairs to get some refreshment; stayed up stairs about ten minutes; hurried down to tie up the ballots; when I went up stairs left the room in charge of Pattee, Smith, Hall, and Russell; took the votes up stairs, and put them in a basket with plates, etc.; went in at Merrimack House; put basket on floor; not out of sight; went to Mr. Smith's store, but not into the bar-room back; made a short stay; left the basket in Smith's store, on or behind a barrel; considered votes as safe as when on my arm; absent about twenty minutes; carried basket home and set it down in the entry; had no reason to suppose the votes could be changed; votes were all tied in bundles at the hall, and found so when at home; had the second count about one hour after I returned; the votes did not agree with the first count, which is as follows: —

First Count.

Caleb Barker,	258
John C. Tucker,	264
Nicholas J. Bean,	255
Horace Poland,	249

Second Count.

Caleb Barker,	266
John C. Tucker,	255
Nicholas J. Bean,	263
Horace Poland,	244

At the second count were present Messrs. Hall and Pattee and myself, who are ward officers; also Johnson, Talbot and Hanson, who are not officers. No one said to me there was an error in the first count; was satisfied there was an error somewhere after the second count; waited until all had come who were invited, before we commenced counting; any one could have altered the result dishonorably, at my house, if so disposed; I was satisfied myself that the count at my house was right; always counted them at my house, and have never found a discrepancy before; might have been an error at the polls; don't think the votes were altered in basket. [The testimony of the inspectors disagrees with that of the warden, in so far as to say that the votes were on the table at Mr. Mahan's, when they came in.] Don't think the count at the house of any importance; think the votes were counted right, and declared right at the polls.

Your committee have made a second count of the votes for governor, and find the result as follows, compared with the first count at the polls: —

First Count.

B. F. Butler,	460
G. N. Briggs,	59
N. P. Banks,	176
	696

Second Count.

B. F. Butler,	460
G. N. Briggs,	60
N. P. Banks,	180
	700

The committee have also made another count of the votes for representatives, which presents the following result compared with the second count at the warden's house: —

Second Count, at Mahan's.

John C. Tucker,	255
Horace Poland,	244
Caleb Barker,	266
N. J. Bean,	263

Third Count, at State House.

J. C. Tucker,	255
H. Poland,	214
C. Barker,	266
N. J. Bean,	263
S. Adams,	179
Chase,	175

Your committee refer all the facts herein set forth, for the consideration of the house, with the report that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J. 1860, p. 158.]

SAMUEL H. PIERCE *v.* SIMON BROWN.

House Document, No. 33. January 30, 1860. Majority report by Messrs. ATTWILL, ELLIS, BLISS and NASH; — Minority report by Messrs. PRATT, ORDWAY and BARKER.

Qualification of Voter. Residence. A person, who had lived and voted in Weston, acting as teller in a bank in Waltham, married in Weston in June preceding the election, and boarded there with his father-in-law until the week of the election. During the summer he had agreed to take a house in Waltham when completed, but for no definite length of time, the house to be ready in October or November. Upon the completion of the house in November, he began moving into it on Thursday and Friday before the election, and, with his wife, spent the night there, and also the night of the election. He intended to reserve the right of voting in Weston, and left some clothing and furniture there, and got his provisions and had his washing done there, until after the election. He had an understanding with his father-in-law that he could return to Weston whenever he desired, and should make it his summer residence, and never had any definite intention of making a permanent residence in Waltham. It was *held* by a majority of the committee (four), that at the time of the election he resided in Weston, and was qualified to vote there, — and by the minority of the committee (three), that he had removed his residence to Waltham, and was not qualified to vote in Weston.

The Committee on Elections, to whom was referred the remonstrance of Samuel H. Pierce and others, of the tenth Middlesex representative district, against the right of Simon Brown to a seat in the house of representatives, have attended to that duty, and beg leave to report: —

The principal and only points relied upon to sustain the allegations contained in the above-named remonstrance are, —

The tenth district is composed of Concord, Weston and Lincoln;

That the votes in said Middlesex district were divided as follows, not including scattering votes: —

For Simon Brown, ...	192
G. W. Stearns, ...	191

That one vote which was given for Simon Brown, was by J. S. Williams, now residing in Waltham, said vote being given at the polls in the town of Weston, on the 8th of November, for representative of the tenth district to the legislature of Massachusetts, by the aforesaid J. S. Williams, who had, it was alleged, in point of law and fact, at that time made a change of domicile from the town of Weston to Waltham; that the vote given by Williams, being illegal and void, the plurality of Simon Brown fails, and he is not entitled to the seat he now occupies.

The only testimony in this case before the committee was given by Williams, the legality of whose vote was questioned, as aforesaid. His business for the last six years has been a teller in the Waltham Bank. Was married on the 24th of June last, and boarded with his father-in-law in Weston until the week of the election in November. It appeared, in his evidence, that he saw a plan of a house which a certain builder in Waltham had in contemplation of erecting, and made a bargain to take it, when completed, for no definite length of time. Said house was to be finished some time in October or November. It also appears that the house was finished in November, and Mr. Williams commenced moving on Thursday and Friday, previous to the election. It also appears that himself and wife went on Thursday and Friday previous to election and spent the night there, and also spent the night of the election.

It further appeared that Mr. Williams had thoughts on the subject of voting, and intended to reserve his right of voting in Weston; left some of his own clothing and his wife's clothing, lounge, chairs, etc. His bread and provisions were brought from Weston; also that his washing was done in Weston until two weeks after the election. His bedding and clothing were brought down partly on election week and part the week after.

It also appeared in evidence, that there is an understanding between himself and father-in-law that if this, their first experiment in housekeeping, shall not please them, they are welcome to come back to Weston; further, that it would be cheaper for him (Wil-

liams) if he keeps the house in Waltham, to make Weston his summer residence. Also, that he, the said Williams, never had any definite intention of making a permanent residence in Waltham.

In view of the fact that this man has been a voter in Weston ever since he became of age; has never voted anywhere else; has not taken steps towards voting elsewhere; was contemplating a change, and thought he had an undoubted right to think of preserving his elective franchise; that it cannot be said of this man that he had finished moving; that it cannot be said that he had moved, and that the most that can be made to appear is that he had commenced moving; that to say, under all the circumstances, that he, the said Williams, had lost his right to vote, is applying a very illiberal construction to the laws.

Your committee therefore recommend that the remonstrants have leave to withdraw.

Messrs. PRATT, ORDWAY and BARKER submitted the following MINORITY REPORT: —

As stated by the majority report, the whole question in issue depends upon the right of one John S. Williams to vote in the town of Weston, on the 8th day of November last. If he (Williams) had such right, then Mr. Brown was legally elected. If he had not, then the election resulted in a tie vote.

The circumstances of the case as testified to by Williams himself are briefly these: — Williams has been for several years and is now a teller in the Waltham Bank; and previous to the 23d of June last, resided with one Andrew Floyd in Weston. On that day he married a daughter of said Floyd, and continued to board with him as before. He did not furnish a room at his father-in-law's, but had some furniture there. Sometime in July last he made a bargain with a Mr. Buttrick to take a house, when completed, which said Buttrick was building in Waltham. The house was finished in October, and on the 2d of November he took possession by putting down carpets, etc. On the 3d of November he moved his family and his furniture, with the exception of a few articles hereinafter mentioned, and did not return to Weston previous to the election, except for a short visit on Sunday, returning to Waltham at night. And he also testified that he had not then, and has not now, any definite intention of returning to Weston to live. He further testified that he walked over to Weston on the afternoon of election day and voted, returning to Waltham the same night, where he has resided ever since.

Upon this evidence the undersigned respectfully submit that the domicile of said Williams on the 8th of November (five days after

he removed his family) was clearly in Waltham and not in Weston. Therefore he was not legally entitled to vote in Weston on that day.

But the majority of the committee take the ground that he had not finished moving, and consequently had not changed his domicile. He testified that previous to the election he thought of his right to vote, and that he intended to leave enough in Weston to retain his right there. Consequently he left a lounge, some chairs, and a part of his own and his wife's clothing; also had their washing done in Weston, election week. These things he removed to Waltham the week succeeding the election. Now, in doing this did he avoid the removal of his domicile to Waltham? Most clearly not, for the circumstances all show that he intended to make, and did make, Waltham his place of residence, his *domicile*, and he only intended to retain his *right to vote* in Weston a few days after he removed his *domicile*, his *home*, to Waltham. This clearly he could not do, as his right to vote depends upon his place of domicile.

Under these circumstances we are clearly of the opinion, that, although he intended to retain his right to vote in Weston, his acts did not correspond with his intentions, and therefore he was not a legal voter in Weston on the 8th of November last. But he testifies that he did vote there at that time, for Simon Brown for representative. This vote, then, should be deducted from the number which Brown received. This would leave the result—Brown, 191; Stearns, 191.

We are, therefore, compelled to arrive at the conclusion "that Simon Brown is not entitled to a seat in this house from the tenth representative district of Middlesex County."

[The report of the majority of the committee was accepted. H. J., 1860, p. 172; but in the opinion of the editors, the report of the minority, upon the facts found, is more in accordance with law, and the more valuable precedent.]

HOUSE—COMMITTEE ON ELECTIONS, 1864.

Messrs. AMBROSE A. RANNEY of Boston, *Chairman*; CHARLES H. PERKINS of Plympton, JOHN STETSON of Medford, JAMES K. COMSTOCK of Blackstone, HENRY W. FOLEY of Boston, and HENRY BARKER of Quincy.

LUTHER CHAPIN, JR., *v.* BARNABAS SNOW.

House Document, No. 17. January 21, 1864. Report by A. A. RANNEY, *Chairman.*

Mistake in name on Ballot. Votes cast for "Luther Chapin of Ware" should be counted for Luther Chapin, Jr., of Ware, — where it appears that he was known to be a candidate for the office, — that his father, Luther Chapin, lived out of the district, and was therefore ineligible for election, — and that no other person of that name lived in that town.

Same. The word "Junior" added to a name is no part of the name, but merely a word of description used as one mode of distinguishing persons of the same name.

The Committee on Elections, to whom was referred the petition of Luther Chapin, Jr., claiming the seat of Barnabas Snow, the remonstrance of the selectmen of the town of Prescott, the remonstrance of the selectmen of Belchertown and others, the remonstrance of George H. Gilbert and fifty-two other citizens of Ware, report:

This case presents a single question only for determination. Edward A. Thomas of Prescott, and Barnabas Snow of Ware, were duly returned, and now hold seats in this house, as representatives from the sixth representative district in Hampshire County, composed of Belchertown, Ware, Enfield, Greenwich and Prescott. The seat of said Snow only is contested. Luther Chapin, Jr., of Ware, claims the seat for himself on the ground that 172 votes cast, as expressed on the ballots, for "*Luther Chapin of Ware*," were not, but should have been, counted for himself. The vote of the district, as given and recorded, stood as follows, viz.: —

Edward A. Thomas of Prescott,	587
Barnabas Snow of Ware,	294
Luther Chapin, Jr., of Ware,	256
Luther Chapin of Ware,	172
John T. Warner of Greenwich,	208
Lewis Gilbert of Ware,	1

If the votes are to be counted as contended for by the contestant, then he, and not said Snow, is entitled to said seat. Some question was made at the hearing about the regularity of the proceedings, in the mode by which the return of the votes for the town of Prescott was made. But as the rejection or admission of the vote of this town would not affect or change the result, the committee have not considered the alleged irregularity of any account. It was, in the worst aspect of the transaction, only an informality in sending a transcript of the record of the vote of that town, by the wrong person, and in the clerk of the town of Prescott not attending the meeting of the clerks to count the votes of the district, as required by law. Luther Chapin, the father of the contestant, was living at the date of the election. He then resided in Pelham, and had lived there some sixty-seven years prior to that time. He never lived in Ware, and there was no other resident of that town, nor within the district, answering to that name, unless he be the contestant. Luther Chapin, Jr., the contestant, was and has been for some seven years last past a resident of, and engaged in business in, the town of Ware. There being no other person of that name in the town, he has been called and known, and his name written, sometimes as Luther Chapin, and sometimes with the addition of *junior*. He was known to be a candidate for the said office. His own son printed or got printed many or most of the ballots cast for him, as Luther Chapin of Ware, as is alleged. The town of Ware alone cast seventy-seven of the disputed votes.

Under these circumstances, and with the aid of these facts, the committee have no doubt that the votes in question were designed for the contestant. The intention of the electors ought, of course, to govern in such a case, if the same can be legally ascertained and regarded. If the father of the contestant had lived in Ware, and been eligible to the office, the different classes of votes referred to would have been distinct, and clearly, on the face of the ballots, have designated and distinguished two different individuals. In such a case, if it existed, it would hardly have been safe or competent in law, to have attempted to speculate or inquire into the actual intention of the voters. But no such case exists here. "*Luther Chapin, of Ware*," surely did not designate, and could not be held to apply to, the father of the contestant, for he was "*Luther Chapin, of Pelham*." It did not apply to any other person in Ware, unless it be the contestant; for there was none such. Besides, Luther Chapin, of Pelham, lived without the district, and was constitutionally ineligible to the office; and it would be a very violent presumption, to say the least, to suppose the elec-

tors voted for one whom they could not constitutionally elect, when there was another individual answering the description, who was eligible.

The Lynn case (Election Cases in Massachusetts, Cushing, S. and J., p. 236) furnishes a precedent of some analogy and value on this point. In that case, the name of the person balloted for, and as the vote was recorded, was *James Pratt, Junior.* A person whose name was James Pratt, and who never carried the *Junior* attached to his name, received the certificate of election and was admitted to his seat in the House. His seat was contested. It appeared that at the time of the election, there was another resident of the same town by the name of James Pratt, no way related to the sitting member; but he was constitutionally ineligible. The committee and the House held the sitting member entitled to his seat. The report in that case says: "It would be doing violence to every sound rule of proceeding, in such cases, to presume that the electors voted for one whom they could not constitutionally elect, when the individual intended was constitutionally eligible."

It is to be observed that the vote of Ware alone for "Luther Chapin, of Ware," if counted for the contestant, would elect him. But there seems no principle by which such votes in that town can be distinguished from similar ballots in the other towns of the district, unless some presumption may be raised as to the intention of the voters of that town from their supposed knowledge as to the residents of the town.

It is contended by the sitting member that "Luther Chapin, of Ware," is not the name of the contestant, and does not designate him, but some one else. This position involves the law as to what effect is to be given to the addition of the word "*Junior*" to the name; and whether it does, or does not, form a part of the name. The law seems clear that it is no part of the name, but that it is used as a mode of distinguishing individuals of the same name, especially when residents of the same town. But this is not the only mode used for such a purpose. The residence and occupation are often used for the same purpose. Such are the decisions of the Supreme Court of this Commonwealth and elsewhere. (*Kincaid* v. *Howe*, 10 Mass. 203; *Commonwealth* v. *Perkins*, 1 Pick. 388; *Cobb* v. *Lucas*, 15 Pick. 7; *Jameson* v. *Isaacs*, 12 Verm. 611; *Johnson* v. *Ellison*, 4 Monr. 526.) Morton, J., in 15 Pick. p. 9, says: "The addition of *second* to his name would as clearly distinguish him from an older person of the same name, as *junior*. Neither of the terms constitutes any part of the name, but they are used to describe and designate the person; as his residence is sometimes used for the same purpose." Collamer, J. (in 12 Vermont

Reports, p. 613), says, in giving the opinion of the whole Court: "The usual addition of *junior* to a man's name, to distinguish him from an elder man of the same name and place, constitutes no part of such man's name, any more than *longer*, *whiter*, *cooper*, or any other designation. This has been too often decided to be again questioned." *

Inasmuch as, in the case now under consideration, the residence is given on the ballots it sufficiently designates the contestant, and can apply to no one else. He is both "Luther Chapin, of Ware," and "Luther Chapin, Jr., of Ware," if any one sees fit to add the *junior*. in such a case. The residence being given, either designation would apply to him, in the absence of any other person bearing the same name in the town named. So that the case seems to admit of no doubt as to whom the voters meant to vote for, and to whom the ballots themselves apply.

The committee therefore report, that Luther Chapin, Jr., of Ware, the contestant, and not Barnabas Snow, of Ware, is entitled to said seat.

[After a motion to recommit, with instructions to inquire whether any legal election had been held, was made and lost, the report of the committee was accepted. H. J. 1864, p. 54.]

* [NOTE BY THE EDITORS. It is clearly settled in Massachusetts that the words, "Junior," "Second" or "Younger," annexed to a person's name, are used merely for the purpose of designation and distinction, and form no part of the name. The place of residence or other description might be used for the same purpose. In *Kincaid* v. *Howe*, 10 Mass. 203, 205, the court says: — "*Junior* or *Younger* is no part of the name, — but an addition by use, and serving for a convenient distinction, when a father and son have each of them the same Christian and surname, or when two persons of the same names and occupations reside in the same town." See in addition to cases cited in the above report, *Commonwealth* v. *Beckley*, 3 Met. 330; *Commonwealth* v. *Parmenter*, 101 Mass. 211. In *Simpson* v. *Dix*, 131 Mass. 179, the court held that, where land was conveyed to J. S., and there were two persons of that name, a father and son, there was no presumption that the father was intended as grantee, but it was purely a question of fact, to be determined by the circumstances under which the conveyance was made. It is held in cases before Congress, that a candidate is entitled to the benefits of all ballots which are manifestly intended for him, though they omit the addition of the word "Junior," by which he is generally known. *Turner* v. *Baylies* (Plymouth Dist. Massachusetts); Clark & Hall Cong. Election Cases, 234. See also, *Williams* v. *Bowers*, *Ib.* 263; *Willoughby* v. *Smith*, *Ib.* 265. The question is elaborately discussed in *People* v. *Cook*, 14 Barb. (N. Y.) 299 *et seq.*]

JOSEPH T. WRIGHT *v.* JOSEPH A. HOOPER.

House Document, No. 26. January 26, 1865. Report by EDWARD BANGS, *Chairman.*

Mistake in name of Candidate. Votes cast for "*Thomas* T. Wright of Marblehead," for representative, should be, in an election controversy, counted for *Joseph* T. Wright, upon proof that there was no person named Thomas T. Wright in the district, – that no person, except the petitioner, named Wright, eligible for election, then lived in Marblehead, — that Joseph T. Wright was one of the regular candidates of his party for that office, and that his name was printed "Thomas," instead of 'Joseph," on some of the ballots, by mistake.

Same. Evidence of intention of Voter. While any facts may be given in evidence tending to explain the intention of the voter regarding his vote, and his own testimony as to such facts may be received, he should not be allowed to testify for whom he intended to vote by his ballot.

The Committee on Elections, to whom was referred the petition of Joseph T. Wright, claiming a seat in this house, and remonstrating against the right of Joseph A. Hooper to hold the certificate of election which has been given to him; the remonstrance of C. W. Palfrey, W. S. Messervy and forty-three others, legal voters in ward 5 of Salem; and the remonstrance of William Fabens and twenty-two others, legal voters of Marblehead, report: That at a hearing of the parties in the above matter, the following facts were proved to the satisfaction of the committee, by competent evidence.

That at the election held on the eighth day of November last, in the fourteenth representative district, composed of the town of Marblehead and the fifth ward of the city of Salem, the vote of the district for representative to the General Court was recorded as follows:—

For	Joseph T. Wright of Marblehead,	720
	George W. Patch of Marblehead,	942
	Joseph A. Hooper of Marblehead,	742
	William Nutting, Jr., of Marblehead,	717
	Thomas T. Wright of Marblehead,	253
	Joseph Hooper,	1
	Stephen Prime,	1

That certificates of the election of George W. Patch and Joseph A. Hooper were duly returned, and that they now hold seats in

this house as representatives from said district,—the right of said George W. Patch to his seat not being contested;

That all the votes thrown for *Thomas* T. Wright were cast in ward 5 of the city of Salem;

That there is, and then was, no such person as Thomas T. Wright of Marblehead;

That no person named Thomas T. Wright was the candidate of any party at the said election in said district, or was to be found in said district;

That no person named Wright, eligible to the office of representative, then lived in Marblehead, except said Joseph T. Wright, the petitioner;

That said Joseph T. Wright was, with said George W. Patch, nominated as the candidate of the republican party for representative to the General Court; that he was a returned soldier who had lost one arm in battle;

That the ballots used in said ward 5, were printed by order of the republican committee of the city of Salem, and were by them intended to have borne the names of George W. Patch and of said Joseph T. Wright for representatives to the General Court; but that, by mistake, the name of said Wright was printed *Thomas* T. Wright; that the mistake was not discovered until two hundred and fifty-three of the misprinted ballots had been cast, when the word "Thomas" on the ballots remaining in the vote distributors' hands, was altered in pencil to "Joseph" and that it was well known at the voting-room in said ward 5, and freely commented upon, that the republicans were voting for Wright of Marblehead, a one-armed soldier, attention being particularly drawn to this circumstance from the fact that said Joseph A. Hooper, who was the candidate of the democratic party, was also a returned soldier who had lost one arm in battle.

The sitting member, Joseph A. Hooper, who was present at the hearing, made no attempt to dispute the foregoing facts, but frankly admitted the same to be true, so far as they were within his knowledge.

There was also evidence before the committee, tending to prove that all the persons who signed the remonstrance of C. W. Palfrey and others were legal voters of said ward 5; and several of said signers appeared before the committee and testified that they cast ballots bearing the name of *Thomas* T. Wright, but intended to vote and supposed they were voting for the petitioner.

This evidence the committee thought it best not to consider. They could find no instance in which electors have, in this Com-

monwealth, been allowed to testify as to the person meant to be designated by their ballots.

In New York, it seems to be settled by a series of decisions that they may so testify.—*People* v. *Ferguson*, 8 Cowen, 102; *People* v. *Seaman*, 5 Denio, 409; *People* v. *Cook*, 4 Selden, 67.

But the committee perceive objections, on the ground of public policy, to the admission of such evidence, and consider the safer rule to be that, while any facts may be given in evidence to explain the intention of the elector, and his own testimony as to such facts may be received, he should not be allowed to testify as to his own intention in voting.—See *Carpenter* v. *Ely*, 4 Wis. 420.

Without this evidence, however, there remains enough to satisfy the committee that those voters who cast the ballots printed *Thomas* T. Wright, intended to vote for the petitioner.

It has often been decided that the only object of an inquiry like the present, should be to ascertain, by competent evidence, the expressed will of the electors.—*Story*, *Pet.*, 20 Pick. 484–493; *Mass. Cont. Elections*, Cushing S. and J., *Lynn*, 236.

It is a similar object which courts propose to themselves in cases where a question is raised as to the proper recipient of a testator's bounty, namely: to ascertain and carry out the will of the testator.

Had a legacy been bequeathed by will to *Thomas* T. Wright, of Marblehead, and a claim therefor made by the petitioner, and supported by evidence similar in kind and degree to that before the committee in this case, the court would have no difficulty in directing the legacy to be paid to the petitioner.—See *Smith* v. *Coney*, 6 Vesey, 42; *Thayer* v. *Boston*, 15 Gray, 347.

This case, though not precisely similar in its facts, comes within the principles of law recognized and adopted in the Lynn case.—*Mass. Cont. Elections*, Cushing, S. and J., 236; *Chapin* v. *Snow*, *ante*, p. 96; *Carpenter* v. *Ely*, 4 Wis. 420; *People* v. *Cook*, 4 Selden, 67.

The committee therefore report, that Joseph T. Wright of Marblehead, the petitioner, and not said Joseph A. Hooper of Marblehead, was entitled to a seat in this house as representative from the fourteenth representative district, and that, said Joseph T. Wright having since died, said seat is hereby declared vacated.*

[The report was accepted. H. J. 1865, p. 70.]

* [Note by the Editors. *Mistake in Name on Ballot.* It is well settled by judicial decisions that ballots cast for a person in which he is described by his initials only, by wrong initials, by his surname alone, by his name incorrectly spelt, or with any mistake or incompleteness in the name, will, in any proceeding in court, or before a legislative tribunal to test his title to the office, be counted for him, upon proper and sufficient proof that such ballots were intended to be cast for him. In the leading case of *Carpenter* v. *Ely*, 4 Wis. 420, votes for "D. M. Carpenter," "M.

D. Carpenter," "M. T. Carpenter," and "Carpenter," were proved to have been intended, and were therefore counted for Matthew H. Carpenter, and votes for "George B. Ela," and "Ely," were counted for George B. Ely. In *People* v. *Ferguson*, 8 Cowen (N. Y.) 102, a ballot for "H. F. Yates" was counted for Henry F. Yates. In *People* v. *Seaman*, 5 Denio (N. Y.) 409, a ballot for "J. R. Eastman," was counted for John R. Eastman. And so in *People* v. *Cook*, 8 N. Y. 67, ballots for "Benjamin C. Welch, Jr.," and "Benjamin Welch," were shown to have been intended for Benjamin Welch, Jr. For other authorities in support of the rule that mistakes in the name of the candidate, or of the office for which he is voted, will be corrected in a contest for office, upon proper proof, see *People* v. *McManus*, 34 Barb. (N. Y.) 620; *Twenty-sixth Ward Election*, 35 Leg. Int. (Penn.) 420; *State* v. *Gates*, 43 Conn. 538; *Clark* v. *Robinson*, 88 Ill. 498; *Talkington* v. *Turner*, 71 Ill. 234; *People* v. *Matteson*, 17 Ill. 167. The rule is similar in England, *Regina* v. *Bradley*, 3 Ellis & Ellis, 634. So in Congress, votes for "E. M. Braxton," "Elliott Braxton," and "Braxton," were counted for Elliott M. Braxton, upon reasons elaborately stated by Mr. McCrary, in the report of the committee. *McKenzie* v. *Braxton*, Smith Congressional Election Cases, p. 19. And see *Gunter* v. *Wiltshire*, *Ib.*, 233; *Lee* v. *Rainey*, *Ib.* 589; *Strobert* v. *Herbert*, 2 Ellsworth Congressional Election Cases, 5; *Chapman* v. *Ferguson*, 1 Bartlett Congressional Election Cases, 267, — in which case, votes for "Judge Ferguson," were counted for Fenner Ferguson.

It is held in Massachusetts that the use of an initial letter in place of the Christian name of persons, in legal documents or proceedings, is not to be commended, because of the danger of uncertainty in the identification of the person, — but where no doubt of the identity is created, or where such doubt can be removed by competent evidence, the omission to state the Christian name at length is not necessarily erroneous. *Clark* v. *Board of Examiners of Hampden County*, 126 Mass. 282; *Getchell* v. *Moran*, 124 Mass. 404; *Patrick* v. *Smith*, 120 Mass. 510; *Commonwealth* v. *Hamilton*, 15 Gray, 480. And see, *Commonwealth* v. *O'Baldwin*, 103 Mass. 210; *Sowle* v. *Sowle*, 10 Pick. 376; *Shelburne* v. *Rochester*, 1 Pick. 470; *Collins* v. *Douglas*, 1 Gray, 167. So the omission of the middle initial in a name in a legal document, is immaterial, if there is no doubt of the identity of the person. *Commonwealth* v. *Gormley*, 133 Mass. 580; *Commonwealth* v. *O'Hearn*, 132 Mass. 553; *Dwyer* v. *Winters*, 126 Mass. 186. In the absence of proof, however, the court cannot assume that "George Allen" and "George E. Allen" refer to the same person. *Commonwealth* v. *Shearman*, 11 Cush. 546.

Evidence to prove Intention. To prove for whom a ballot was intended, extrinsic evidence is admissible, provided such evidence *explains* and *applies*, without *contradicting*, the ballot. The rule is the same as in cases of latent ambiguities in the language of contracts and wills. That rule was early affirmed in Massachusetts, as follows: "That an ambiguity appearing upon the face of the instrument, which has received the appellation of patent ambiguity, must be explained by the instrument itself, taking into view all its parts, and if it is not capable of such explanation, that it is void for uncertainty; and that a concealed or latent ambiguity, made to appear by some fact referred to in the instrument, may be explained by parol testimony, the evidence then being of the same nature with that which made the ambiguity appear." *Stackpole* v. *Arnold*, 11 Mass. 27, 30. So parol evidence was admitted to show that a note given to "Ebenezer Hall" was the note intended to be secured by a mortgage subsequently given to "Ebenezer Hall, 3d." *Hall* v. *Tufts*, 18 Pick. 455. Where there are two persons of the same name, to either of whom the description of grantee in a deed will apply, there is a latent ambiguity, and extrinsic evidence to show which of them was intended is admissible. *Kingsford* v. *Hood*, 105 Mass. 495. So a deed to "Hiram Gowing, cordwainer," was shown by parol evidence to have been intended for Hiram G. Gowing. *Peabody* v. *Brown*, 10 Gray, 45. And where a deed to a married woman contains her maiden name as grantee, the intention may be proved by evidence that she was known to the grantor by her maiden name, and that there was no other person claiming the name used in

the deed. *Scanlan* v. *Wright*, 13 Pick. 523. But evidence is not admissible to show that the name of the grantee in a deed, was written by mistake, in place of another person, — there being no ambiguity in the deed. *Crawford* v. *Spencer*, 8 Cush. 418. Under a will, where the name of a devisee or legatee is incorrectly stated, leaving a latent ambiguity as to the person intended, evidence is admissible to prove the testator's intention. *Thayer* v. *Boston*, 15 Gray, 347; *Bodman* v. *American Tract Society*, 9 All. 447. But if there is no ambiguity in the name, evidence is inadmissible that some other person than that named, was intended by the testator. *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; *Bliss* v. *American Bible Society*, 2 All. 334. For other Massachusetts cases, in which evidence has been admitted to explain latent ambiguities in the description of persons or subject matter, see *Sargent* v. *Adams*, 3 Gray, 72; *Sutton* v. *Bowker*, 5 Gray, 416; *Gerrish* v. *Towne*, 3 Gray, 82; *Woods* v. *Sawin*, 4 Gray, 322; *Miller* v. *Stevens*, 100 Mass. 518; *Swett* v. *Shumway*, 102 Mass. 365; *Commonwealth* v. *Morgan*, 107 Mass. 199; *Herring* v. *Boston Iron Co.*, 1 Gray, 134; *Barry* v. *Bennett*, 7 Met. 354.

The kind of evidence admissible to prove for whom a vote, incorrectly expressed, was intended, is stated by Judge Cooley: — "We think evidence of such facts as may be called the circumstances surrounding the election, — such as, who were the candidates brought forward by the nominating conventions; whether other persons of the same names resided in the district from which the officer was to be chosen, and if so, whether they were eligible or had been named for the office; if a ballot was printed imperfectly, how it came to be so printed, and the like, — is admissible for the purpose of showing that an imperfect ballot was meant for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever; in which cases it is not admissible." *Cooley, Constitutional Limitations*, p. 770. The rule is recognized in *Clark* v. *Board of Examiners*, 126 Mass. 283, 285, published in the supplement hereto, and in *Carpenter* v. *Ely*, 4 Wis. 258. It was adopted in Congress in *McKenzie* v. *Braxton*, Smith Congressional Election Cases, 22, — the committee (by Mr. McCrary) adding: "It is true that no evidence *aliunde* can be received to *contradict* the ballot, nor to give it a meaning when it expresses no meaning of itself; but if it be ambiguous or of doubtful import, the circumstances surrounding the election may be given in evidence to explain it, and to enable the house to get at the voter's intent. We see no reason why a ballot, ambiguous on its face, may not be construed in the light of surrounding circumstances, in the same manner, and to the same extent, as a written contract." And see *McCrary, Elections*, sects. 395-397.

Voter cannot testify directly for whom he intended to vote. The intention of the voter can be learned only (as ruled by the committee in the above case) from the ballot in question and the circumstances under which it was cast. The law upon this point is stated by Judge Cooley: — "We think that in any case to allow a voter to testify by way of explanation of a ballot otherwise fatally defective, that he voted the particular ballot and intended it for a particular candidate, is exceedingly dangerous, invites corruption and fraud, and ought not to be suffered. Nothing is more easy than for reckless parties thus to testify to their intentions, without the possibility of their testimony being disproved if untrue; and if one falsely swears to having deposited a particular ballot, unless the party really depositing it sees fit to disclose his knowledge, the evidence must pass unchallenged, and the temptation to subornation of perjury, when public offices are at stake, and when it may be committed with impunity, is too great to allow such evidence to be sanctioned. While the law should seek to give effect to the intention of the voter, whenever it can be fairly ascertained, yet this intention must be that which is expressed in due form of law, not that which remains hidden in the elector's breast; and where the ballot, in connection with such facts surrounding the election as would be provable if it were a case of contract, does not enable the proper officers to apply it to one of the candidates, policy, coinciding in this particular with the general rule of law as applicable

to other transactions, requires that the ballot shall not be counted for such candidate." *Cooley, Constitutional Limitations*, 4th ed., p. 770. The former practice in New York, referred to by the committee, of allowing the voter to testify for whom he intended to vote, has been changed by later decisions. In *People* v. *Saxton*, 22 N. Y. 309, 311, the court held that "the intention of the voter is to be inferred, not from evidence given by him of the mental purpose with which he deposited his ballot, or his notions of the legal effect of what it contained or omitted, but by a reasonable construction of his acts." And see *Naar, Elections*, p. 137; *People* v. *Cicotte*, 16 Mich. 283; *State* v. *Griffey*, 5 Nebraska, 161. In *Kingsford* v. *Hood*, 105 Mass. 495, the court refused to allow evidence of the declarations of the grantor in a deed, regarding the person intended as grantee.

Distinction between Canvassing Boards and Tribunals trying Title to Office. In determining whether votes, incorrect in the name of the candidate for whom they were intended, should be counted for him, the distinction between canvassing and returning boards, and tribunals empowered to try election controversies and decide the title to the office, must be observed. A canvassing board has merely the ministerial duty of counting the votes returned, exactly as they are returned, and cannot receive or consider any extrinsic evidence regarding the intention of the voter, their jurisdiction being confined to the records of votes returned and laid before them.—*Clark* v. *Board of Examiners*, 126 Mass. 282. But in the case of a controverted election before a legislative body or a judicial tribunal by *quo warranto* or other process to try the title to an office, the question is not who appears from the returns to have been elected, but who in fact was elected; and upon that issue extrinsic evidence is competent to show that ballots, incorrect in the statement of the name of the candidate, were intended and should be counted for him. Cases *supra*.]

SENATE — 1866.

SAMUEL T. FIELD ET AL. *v.* WILLIAM F. WILDER.

HON. ROBERT M. MORSE, JR., HON. WILLIAM L. REED, HON. GEORGE O. BRASTOW, HON. JAMES EASTON, 2d, and HON. EBENEZER DAVIS, *Special Committee.*

Senate Document, No. 166. March 28, 1866. Report by MR. MORSE, *Chairman.*

Eligibility of Senator. Inhabitancy. Upon the question whether a senator, returned as elected in 1865, had been an inhabitant of the Commonwealth for the space of five years immediately preceding his election, it *appeared* that he was born and brought up in Shelburne, Massachusetts. About 1854 he went to New Jersey and remained there teaching school for about two years. He then went to Illinois, where he lived until 1863, marrying and having children there; being commissioned a justice of the peace for four years from April, 1857, and serving as a commissioned officer in the army from that State in the war. He returned with his family to Shelburne in 1863, in which year his name first appeared upon the voting list there, being assessed and paying his first tax there in 1864, and continuing to reside there. It was *held* that he had not been an inhabitant of the Commonwealth for such space of five years and was ineligible to election.

The Committee to whom was referred the remonstrance of Samuel T. Field and twenty-one others, legal voters of the Franklin Senatorial District, against the right of William F. Wilder to hold a seat in the Senate, respectfully submit the following report: The Constitution (chap. 1, sect. 2, art. 5) provides as follows: —

"No person shall be capable of being elected as a senator, who has not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election."

The remonstrants alleged that Mr. Wilder was not eligible to the office of senator at the time of election, and is not now eligible, "because he had not been an inhabitant of this Commonwealth five years immediately preceding the time of said election." And the committee were to consider and to report upon the correctness of that allegation.

At the hearing, Mr. D. O. Fisk testified that he was a resident of Shelburne, was born there and had voted there for twenty-four years, and had been a representative in the General Court, and that he lived within a mile and a half or two miles of the residence of Mr. Wilder's father, where Mr. Wilder also resided; that he knew Mr. Wilder when a boy at school in the town, and had

known him since; that about twelve years ago Mr. Wilder left town, he being then about twenty-one years of age, and went to New Jersey, where he remained teaching school, as he (the witness) understood from members of his family and from a letter written by himself, for a period of about two years; that Mr. Wilder then went to Illinois, where he lived until the summer or fall of 1863; that during that time he married and had children there and was elected to the office of justice of the peace in the town of Sublette, in the county of Lee in that State, and was commissioned as such for the term of four years from the thirtieth day of April, 1857; that he served as a commissioned officer from that State during the war; that in the summer or autumn of 1863, or possibly, in the spring of that year, Mr. Wilder returned with his family to Shelburne and has since resided there; that his name appeared on the voting list of that town in 1863, for the first time, and that he did not pay a tax there till 1864; that at the town meeting in March, 1864, Mr. Wilder was elected moderator, but stated that he was not familiar with the statutes and with the methods of doing business in this State, and that the town clerk then said that Mr. Wilder was not eligible to that or any other office, he not having been a resident of the town; that thereupon, without taking any vote upon accepting Mr. Wilder's declination, the meeting proceeded to elect the witness moderator.

The remonstrants also presented a certificate from the secretary of State of Illinois, under the seal of the State; that the records of his office show that Mr. Wilder was commissioned a justice of the peace, as testified to by Mr. Fisk; also a certificate of Pliny Fish, chairman of the board of selectmen and assessors, that it appears from the valuation books of the town of Shelburne that Mr. Wilder was first assessed in that town in 1864.

The remonstrants offered to examine Mr. Wilder as a witness, but Mr. Wilder declined to be examined, and the remonstrants thereupon rested their case.

Mr. Wilder then stated that he did not propose to testify himself, or to introduce any evidence, but would submit the case to the committee.

The committee are unanimously of opinion that Mr. Wilder was not an inhabitant of this Commonwealth for the five years immediately preceding his election, and accordingly report the accompanying Resolve.

[The Resolve declared the seat of Mr. Wilder vacant. The report of the committee was accepted, and the seat of Mr. Wilder declared vacant. S. J. 1866, p. 492.]

HOUSE—COMMITTEE ON ELECTIONS, 1866.

Messrs. GILES H. WHITNEY of Winchendon, *Chairman;* TIMOTHY G. BRAINERD of Halifax, JAMES W. BRIGGS of Amesbury, EDWARD RILEY of Boston, GEORGE W. FLETCHER of Dunstable, EPHRAIM B. GATES of Palmer and THOMAS METCALF of Northfield.

LORENZO D. COGGSWELL *v.* WILLIAM I. MCNEIL.

House Document, No. 32. January 26, 1866. Report by GILES H. WHITNEY, *Chairman.*

[In this case the committee recounted the votes for representative in the twenty-third Middlesex district, the reasons for the recount not being stated, and found that the sitting member had received 608 votes, and the petitioner, Lorenzo D. Coggswell, 580. In addition 32 votes were found to have been cast for "L. D. Coggswell," and, upon the admission of the sitting member that these votes were undoubtedly intended for the petitioner and should be counted for him, the committee so counted them, finding his total vote to have been 612. The committee thereupon reported that the petitioner was entitled to the seat, and the report was accepted. H. J. 1866, p. 64.]

FREDERIC PEASE ET AL. *v.* CROMWELL G. ROWELL.

House Document, No. 65. February 8, 1866. Report by GILES H. WHITNEY, *Chairman.*

Publication of Notice of Petition contesting Election not required. Publication of notice of a petition involving the election of a representative is not necessary under the statute requiring the publication of petitions affecting the rights or interests of individuals or private corporations.

Eligibility of Representatives. Inhabitancy. Upon the issue whether the representative returned as elected from East Boston, had been an inhabitant of the district for one year next preceding his election in November, 1865, it *appeared* that he had formerly resided in Boston; was in the army in 1861; returned to Boston in 1862, living with his father in ward 3, or boarding in wards 5 or 7, until the summer of

1864. In August of that year he tried to get a house in East Boston, and found a boarding place there into which he was about to move, when prevented by the closing of the house by the landlady. He afterwards made other efforts to get a place in East Boston, intending to live there, but continued to board with his wife in ward 7, until early in January, 1865, where he found and took a house in East Boston, in which he resided from that time. It was *held*, that he had not been an inhabitant of East Boston for one year next preceding his election, and was ineligible.

CHARLES R. TRAIN *for sitting member.*

The Committee on Elections, to whom was referred the petition of Frederick Pease and others, legal voters of the second Suffolk representative district, against C. G. Rowell holding a seat, and in favor of Wesley A. Gove for the same, make the following report: That the petition sets forth that Cromwell G. Rowell, now holding a seat in your honorable body, and accredited to the second Suffolk district, is holding said seat contrary to law, inasmuch as he has not been an inhabitant of the district for one year next preceding his election, as required by article No. 21 of the amendment to the Constitution; and they further represent that Wesley A. Gove was duly elected, he having the next highest number of votes, and should be deemed and declared elected, in accordance with article No. 14 of the Constitution aforesaid. A copy of the returns, certified by Samuel F. McCleary, the city clerk, shows that Samuel Small had 746, John B. Ham had 691, Cromwell G. Rowell had 693 votes; Wesley A. Gove had 554, William Burkett 532, and Charles R. McLean 517 votes; and there were some scattering votes; the three first named, having a plurality of votes, were elected.

At the hearing of the petition before the committee the evidence was as follows: In behalf of the petitioners, S. A. Rice testified that Col. Rowell moved from Boston to East Boston, into the house of the witness, on the 21st day of January, 1865; he also testified that the furniture of Col. Rowell was brought to said house on the 20th of January, 1865. Marvin S. Blood, now of Malden, formerly of Boston, testified that Col. Rowell boarded with him three or four months, according to the best of his recollection, prior to the 21st day of January, 1865, at No. 2 Columbia Building, in the city of Boston, and that on said 21st day of January he left his house.

The testimony of Mr. Rowell in his own behalf was as follows: That he came to live in the city of Boston in 1852 or 1853; that he came to work at his trade of tin-plate worker, and brought his wife with him to Boston, and kept house about six years after he came to the city to live; that he voted in the city, and was an

inspector in 1854 or 1855, in what was formely ward 3 and held the office, as he thought, about two years (although the witness was not certain as to the time), and was appointed on the police in 1854, according to the recollection of the witness, and served on the police about seven years, or until the breaking out of the war; that on the breaking out of the war he resigned his position on the police, and, with others, raised a regiment, and went as lieutenant-colonel of the ninth Massachusetts volunteers; that his wife died in 1860, and, from the time of his wife's death to the time of his going out, Col. Rowell boarded; that he sailed from Boston June 25, 1861, and returned to Boston the early part of the spring, or the latter part of the winter of 1862. While he was in the service, Col. Rowell married again. The witness stated, that for about a year after returning to Boston, it was his intention to return to the service; he was in no business for eight or ten months or so, and lived on his friends for about six weeks in ward 1, and then he and his wife went to his father's, who lived in ward 3, and stayed there until early in the following spring. Previous to leaving his father's house, he had entered the employ of Pond & Dunklee, 87 Blackstone Street. After leaving his father's house in the spring, he went to board at the corner of Leverett and Causeway Streets, in ward 5. The witness said that he was looking for a house all this time, and assigned this fact, as a reason why he changed so often. He then left the corner of Leverett Street, and went to a house a few doors below, and had a room, and boarded three or four doors below his room where he lived. The witness left there, and went to Minot Street, in ward 5; his father was away, and his mother was sick, and wished him to come and take care of her, and keep her company, and the witness went; the house was in ward 3. He remained there several months, but did not know how long, and from there went to the house of Mr. Blood, some time, as the witness thought, in November, 1864, in Columbia Street, ward 7. The witness further stated that his goods were stored most of the time. In the summer of 1864, some time in August, some friends of the witness in East Boston sent word to him that they thought that they could get board for him on Meridian Street, East Boston, that they thought would suit him. He had been looking for a house in East Boston several months previous to that, and had been determined for several months previous to that to take a house in East Boston for the purpose of making East Boston his home, or place of residence. The witness went to East Boston and looked at the house, and liked the place very well, and engaged board with the people for himself and wife. This was in July or August; he was then at his father's house. He was to furnish his

own room, and sent over his carpets for that purpose; he sent besides the carpets, one of his trunks containing wearing apparel, and in reply to his counsel, Mr. Train, he said that he did not send any bed, bedstead, or bureau, at that time; he wanted to get his carpet down, and before he had an opportunity of sending the balance of his goods which he intended to send a few days afterwards, some member of the lady's family, with whom he wished to board, was taken sick (a married daughter down East), and required her mother's presence; the daughter whom the witness saw, when he saw the house, came over; he had his things then packing; those that he intended to leave, he was then packing away, and was about ready to go over, and informed him that it would not be possible to take them to board just then; consequently, the project had to be abandoned for a time. When he had sent his things to East Boston, he had forgotten the number of this house. Accordingly, he sent the teamster to his friend Mr. Grover, to get directions from him where to carry the goods. When the programme was changed, and by this expression, the witness explained when the lady informed him that he could not come there just then, he got Mr. Grover, or some member of his family, to take these things to their house, or somewhere for the time.

In answer to an inquiry by his counsel, for what purpose, the witness replied that he intended to see if he could not find some other place in East Boston where he could board a time. Shortly after that, word was sent to Col. R., from Mr. Grover's family, that they knew of a cottage house on Meridian Street, or near Meridian Street. The wife of Col. R., and Mrs. Grover, at his request, Mrs. Grover being acquainted with the wife of the landlord who owned this estate, called on her to get the refusal of this house. This was shortly after sending his things over there. He did not remember exactly the time — along in October the witness thought — and that it was before he went to Blood's to board. According to the representation of the landlord, who owned the house, a family occupied it at the time, and had occupied it for some time, who, through some reason, had failed to pay their rent, and he wished to get them out, but did not desire to take any measures to get them out, because he held the family, except the head of the family, in high respect. The witness waited awhile, but they did not go. Mr. Blood, the witness called for the petitioners, worked for Pond & Dunklee; and he and Col. R. being friends, he thought he would take up his abode with him temporarily, still waiting for this house. The witness and his wife were visiting back and forth in East Boston, throughout all the time. The wife of the witness was in East Boston one day,

and Mr. Rice informed her that there was a house vacant there, and it would be at hand if the other house should be vacated, and in the mean time, some other house might turn up, which might suit as well. The witness went to see Mr. Rice, and he was not at home, but he got the refusal of the house from his wife, in the early part of January, 1865, and a few days after, sent over his things. He lived in Mr. Rice's house about three months, and then moved to the house which he now occupies. The witness stated that the house he now occupies was not the house he was in pursuit of in the fall of 1864, for he became satisfied that the sister of the landlord wanted it, and would be more likely to obtain it than he, and was suited with this house, and moved into it.

A. C. Grover testified that he lived in East Boston, in the summer of 1864, and that in July or August, 1864, there were delivered at his house, one or two trunks belonging to Col. Rowell, and the witness did not remember which, and a roll of carpeting, and that he took care of the goods until they were delivered, on the evening of the same day, at Mrs. Pillsbury's, on Meridian Street, where Col. Rowell intended to board, and as Col. Rowell could not be accommodated at the house of Mrs. Pillsbury, the goods were returned to his house, where the witness saw them a day or two after, but did not know what became of them afterwards.

Before the evidence was put in, it was claimed in behalf of Mr. Rowell, that as no notice had been given, in accordance with the provisions of the 8th section of the 2d chapter of the General Statutes, the committee ought not to proceed.* The point was reserved for the consideration of the committee and to be reported to the house; but the committee, after careful reflection, are of opinion that the provisions of the statute in relation to notice were not designed for election cases. In point of fact, Col. Rowell had the most ample notice, and was fully heard before the committee, and every opportunity was afforded him to present the full merits of his case. The committee, in this connection, cite the law upon this subject, as laid down in Law and Practice of Legislative Assemblies, by L. S. Cushing.

"An inquiry into the rights of a member to his seat, may be brought forward in the first instance, either by the motion of a member, or by the petition of a party interested; or it may arise from an examination of the returns." — Part 1, chap. 20, sect. 1, par. 248.

"It is undoubtedly competent to a legislative assembly to institute inquiries relative to the rights of its members, of its own mere motion,

* Substantially, Pub. Stats. chap. 2, § 5, — for which chapter 24 of the Acts of 1885 has been substituted.

and without the intervention of any complaint on the part of the electors or of one claiming a seat," etc. — Par. 149th of the same, Part 2.

Upon the evidence it was contended, in behalf of Mr. Rowell, that as he was an inhabitant of one of the wards of Boston prior to his going to East Boston, that he was, in legal contemplation, an inhabitant of every part of the city of Boston, and hence eligible for East Boston; but the language of the 21st amendment to the Constitution is as follows: —

"Every representative, for one year at least next preceding his election, shall have been an inhabitant of the district for which he is chosen, and shall cease to represent such district when he shall cease to be an inhabitant of the Commonwealth."

The committee have no doubt that under the provisions of the Constitution Col. Rowell must have been an inhabitant of East Boston, the district for which he is chosen, for one year, at least, prior to the election in November, 1865.

It was further contended, that upon the facts shown, Col. Rowell had a domicile, one year previous to the election in November last, in East Boston.

The law applicable to the case is here cited: —

"An inhabitant, or resident, is a person coming into a place with an intention to establish his domicile or permanent residence, and in consequence actually resides; under this intention, he takes a house, or lodgings, as one fixed or stationary, and opens a store, or takes any step preparatory to business, or in execution of this settled intention." — *United States* v. *The Penelope*, 2d *Peters' Admiralty Decisions*, 450.

"It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent was to concur, and the intent may be inferred from declarations and conduct." — *Shaw*, C. J., 117 Pick., p. 234.

The law of domicile is discussed in many other cases, but it was not thought best to encumber the report by any more citations. All the material portions of the evidence are herewith reported, so that Col. Rowell may have the benefit of it in any discussion that may ensue in the house.

It is hoped and believed, that nothing material to either party has been omitted in the report of the evidence.

The committee are of the opinion, that whatever may have been the intent of Col. Rowell, he had not acquired a domicile in

East Boston one year previous to the election in November la To use the language of Shaw, C. J., in the case last cited, " *act and intent must concur.*" And in Col. R.'s case, the commit think *that the act and intent did not concur*, and are unanimou of the opinion that Col. Rowell is not entitled to his seat, be ineligible thereto.

[The committee also reported that the petitioner was entitled the seat, and reported a resolution to that effect. The house jected an amendment to the resolution, to the effect that Mr. Ro was eligible, by a vote of 35 yeas to 163 nays, and then adop an amendment declaring the seat vacant, and the resolution as amended was adopted. H. J. 1866, p. 128. — A precept for a r election to fill the vacancy was ordered, and at that election I Rowell, being then eligible, was again elected, and qualified.]

DAVID THAYER ET AL. *v.* GEORGE A. SHAW ET AL.

House Document, No. 67. February 9, 1866. Report by T. G. BRAINE

[In this case the votes for representatives were recounted with any statement of the reasons, the recount showing that the sitt members were elected. The petitioners claimed that certain vo were unable to read and write, that others had not resided required period in the Commonwealth or city to qualify them voters, and that others had not paid the required tax. Five v for the petitioners were found by the committee to have been by persons who, not having paid the required tax, were not qu fied voters, and these votes were deducted from the vote retur for them. The report of the committee that the petitioners h leave to withdraw was accepted. H. J., 1866, p. 120. As the involved only questions of fact, it is not of value as a preced J. Q. A. GRIFFIN appeared for the petitioners, and A. A. RAN for the sitting members.]

FRANCIS W. BIRD *v.* JOHN M. MERRICK.

House Document, No. 128. February 27, 1866. Report by GILES H. WHITNEY, *Chairman*.

Constable de facto can serve Notice of Town Meeting for Election. Where, from the refusal of a person elected as constable in town meeting to accept the office, the question arises whether a vacancy exists in the office, so that the selectmen can fill it by appointment, or whether the former incumbent holds over, and the selectmen proceed to make an appointment, and the person so appointed assumes the duties of the office, such person is at least a constable *de facto*, and as such can serve the warrant for the town meeting.

Notice of Meeting for Election. An election will not be set aside where full notice, as required by the vote of the town, has been given, merely because such notice may have been served by a person who was not *de jure* a constable.

The Committee on Elections, to whom was referred the petition of F. W. Bird of Walpole, representing that the meeting for the election of State officers, in the town of Walpole, in November last, had been illegally warned and held, and that the proceedings at said meeting were null and void, and that the votes cast in said town of Walpole, for representative to the General Court from the eleventh Norfolk representative district, were illegal, and that the election of John M. Merrick of Walpole, depending upon said votes, he, the said John M. Merrick, is not entitled to his seat, and that the petitioner, who is one of the two persons voted for, who received the highest number of votes legally cast in the aforesaid district, is legally elected one of the representatives from said district, and is entitled to the seat now held by the said John M. Merrick, having fully considered the same, make the following report:

That the inhabitants of Walpole were notified and warned to meet for the election of State officers, in November last, by one James G. Scott, who undertook to act as constable of Walpole for that purpose, and whose return shows that he gave notice of said meeting, in conformity with the vote of the town at the March meeting, 1865, in relation to warning town meetings, but whose authority as constable,— either as constable *de jure* or constable *de facto*,— is denied by the petitioner. At the annual meeting of the town of Walpole, held by adjournment, April 4, 1864, Nathaniel Bird was chosen constable, and was sworn by the moderator.

At the annual meeting of the town of Walpole, held March 6, 1865, it was voted, article 13th: That for warning all town meet-

ings, the constable be required to post up an attested copy of the warrant at each of the public meeting-houses, and at each of the post-offices in the town, seven days, at least, before said meeting.

At the above named meeting, held by adjournment April 3, 1865, the town voted to choose three selectmen, three assessors, and three overseers of the poor, a town treasurer, constable, school committee and collector, all on one ballot. Joseph Whitehouse was chosen constable, but immediately after being chosen, declined in open town meeting to accept the office. Several witnesses, including the petitioner, testified as to the time when Mr. Whitehouse declined. Mr. F. W. Bird was confident that he declined before 4 o'clock in the afternoon. Nathaniel Bird, called by the petitioner, thought that it was after 5 o'clock, when he declined; and the weight of the evidence, in the judgment of the committee, is that it was as late as 5 o'clock when he declined. The evidence upon this point is stated somewhat fully, as there was much effort made to show the precise time of Mr. Whitehouse declining, although the committee, in the view that they have taken of the case, do not consider the evidence material.

Two witnesses testified that the moderator of the meeting gave as a reason for not calling for another balloting for constable, after the declination of Mr. Whitehouse, that there would not be time to elect a constable before sunset.

On the day of the adjourned meeting, being the 3d day of April, the town clerk of Walpole, in conformity with the provisions of the General Statutes, made out a list of officers chosen at the meeting, of whom an oath was required, and placed it in the hands of Mr. Nathaniel Bird — the constable chosen in 1864 — for service. Mr. Whitehouse's name was on the list, and against his name was the word constable; and it appeared by the return of the constable, Mr. Bird, dated April 6th, that he duly notified Mr. Whitehouse to appear before the town clerk and take the oath of office; and it appeared by the return of the town clerk, that other individuals whose names were on the list and who had been summoned to appear, did appear and take the oath of office, but Mr. Whitehouse's name is not among the number.

Mr. Nathaniel Bird testified that Mr. Whitehouse said, when he (Bird) notified him to appear and take the oath as constable, that he should not accept the office.

On the 13th day of April, 1865, Mr. Scott was appointed constable by the selectmen of Walpole, by a writing under their hands; and, as this appointment is somewhat material in considering this question, a transcript of the appointment is here given: —

"To JAMES G. SCOTT, *of the town of Walpole:*

"Whereas, the office of constable for the town of Walpole aforesaid has become and now is vacant, by the refusal of Joseph Whitehouse to take the oath of office, — who was duly chosen at the annual town meeting, holden on the third day of April, in the year eighteen hundred and sixty-five, —

"Now, be it known, we, James G. Scott, James H. Leland and James P. Tisdale, selectmen of the town aforesaid, hereby appoint you constable of Walpole aforesaid, for the year ensuing. Date of the appointment, April 13th, 1865.

"The appointment is signed by

"JAMES P. TISDALE,
"JAMES H. LELAND,
Selectmen of Walpole."

On the 24th day of April, 1865, Mr. Scott was sworn to the faithful discharge of his duties as constable. Mr. Nathaniel Bird testified, that he had never declined acting as constable; and since the 13th of April last, he had made service of writs; he thought between the 13th of April and the November election, but was not confident as to the time when he served the writs. He also served a venire for the December term, 1865, of the superior court at Dedham, and for the February term, 1866, of the supreme court at the same place.

Mr. Scott testified, that he served a warrant for the town meeting in June last, called "to see if the town will vote to pay and refund money expended by the selectmen, or contributed by individuals in aid of and for the purpose of filling its quotas, or furnishing men for the present war."

Mr. Scott also served a warrant for a meeting for the first parish in Walpole, and the meeting was held before the town meeting in June last; he also served a venire for the September term of the superior court at Dedham, and a venire for the October term of the circuit court of the United States at Boston, and also served, as before stated, the warrant for the November meeting for the election of state officers. Mr. Scott never served any writs, and was not qualified so to do by giving bonds, and did not qualify himself, as he did not desire to serve writs.

The law applicable to the case is here cited: —

"Every town meeting shall be held in pursuance of a warrant under the hands of the selectmen, directed to the constables or some other person appointed by the selectmen for that purpose, who shall forthwith notify such meeting in the manner prescribed by the by-laws, or by a vote of the town."— *Gen. Stats., chap. 18, sect. 21.**

* Now Pub. Stats., chap. 27, § 54.

"At the annual meeting, every town shall choose from the inha tants thereof the following town officers, who shall serve during year, and until others are chosen and qualified in their stea Constables are designated as officers to be chosen under this p vision.—*Same, sect. 31.**

"Every person chosen constable shall, if present, forthw declare his acceptance or refusal of the office. If he does accept, the town shall proceed to a new election until some accepts the office, and takes the oath."—*Same, sect. 33.*†

"When a vacancy occurs in a town office by reason of the n acceptance, death, removal, insanity, or other disability, of a p son chosen thereto, or by reason of a failure to elect, the town m fill such vacancy by a new choice at any legal meeting."—*Sa sect. 43.*‡

Chapter 174 of the Acts of 1864§ provides that "whenev vacancy occurs in the office of highway surveyor, fence-view constable or field-driver, in any town, the selectmen thereof m in their discretion, appoint some suitable person to fill the vacanc

It was contended by the counsel for the petitioner that th was no vacancy, Mr. Nathaniel Bird holding over, and that selectmen had no authority to appoint, and that Mr. Scott neither *de jure*, or *de facto*, constable. It was contended by counsel for the sitting member that there was a vacancy, and Mr. Scott was *de jure* and *de facto* constable. The committee w favored with the opinions of other legal gentlemen, learned in law, who had been consulted as to the legality of Mr. Sco appointment as constable, but it seemed that the learned gen men who were consulted did not agree in opinion. The commi being of the opinion that Mr. Scott was "*de facto*" constable, h not thought it necessary to decide whether Mr. Scott was "*jure*" constable or not. In this connection the opinion of Bi low, C. J., in *Fitchburg Railroad Company* v. *Grand Junct Railroad and Depot Company*, 1 Allen, p. 557, as to what c stitutes an office "*de facto*" is cited. "The precise definition an officer *de facto* is one who comes in by the forms of law, a acts under a commission or election apparently valid, but in c sequence of some illegality, incapacity or want of qualification. incapable of lawfully holding the office. The exact distinct between an usurper or intruder and an officer *de facto* is this: *former has no color of title to the office; the latter has, by virtue*

* Now substantially Pub. Stats., chap. 27, § 78.
† Now Pub. Stats., chap. 27, § 81.
‡ See Pub. Stats., chap. 27, § 93.
§ Now Pub. Stats., chap. 27, § 86.

some appointment or election." Now, *Mr. Scott was not an usurper or intruder; he had color of title to the office, by virtue of the appointment from the selectmen.**

The committee are of the opinion that the selectmen acted honestly in appointing Mr. Scott constable, as did Mr. Scott in receiving the appointment and acting under it.

No evidence was offered to show, and it was not pretended on the part of the petitioner, that the notice for the meeting in November was not full, and in conformity with the vote of the town in reference to warning town meetings, or that the vote was in any degree altered, from the fact that Mr. Scott, instead of Mr. Nathaniel Bird, or any other individual, had warned the meeting.

The committee are unanimously of the opinion that the will of the people, when thus fairly ascertained, should not be set aside, and report that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1866, p. 185.]

* [NOTE BY THE EDITORS. The decision of the committee that the acts of a *de facto* officer, in connection with an election, are valid, and that his authority to act cannot be questioned in a contest over the result of the election, is sustained by the decisions of the court. In *Petersilea* v. *Stone*, 119 Mass. 465, the court held that, where notice of an intention to take the poor debtor's oath was served by a person whose term of office as constable had expired, but who was generally known, acted, and advertised himself as a constable, the service was made by a *de facto* constable, and was valid; the court saying:—" If Farr was an officer *de facto*, the validity of the service by him of the notice to take the poor debtor's oath cannot be inquired into collaterally. In order to show that he was not, the plaintiff relies upon the statement of Bigelow, C. J., in *Fitchburg Railroad* v. *Grand Junction Railroad*, 1 Allen, 552, 557, that ' the exact distinction between an usurper or intruder, and an officer *de facto*, is this: the former has no color of title to the office; the latter has, by virtue of some appointment or election.' If this were intended as a general definition of an officer *de facto*, it would be incomplete; but the inquiry there presented to the court was as to the validity of certain acts done by one who acted under a commission *prima facie* valid, and issued by an authority apparently empowered to invest him with the legal rights and powers of the office to which he was appointed, and it is to be limited to the case then before the court. The reason of public policy, upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. This principle has been applied, in England, to the most important office. After Edward IV. obtained the crown, the kings of the line of Lancaster, who had preceded him, were spoken of as ' *nuper de facto et non de jure reges Angliae*;' but although Henry VI. had been declared a usurper by act of Parliament, attempts against his authority (not having been in aid of the rightful king) were capitally punished. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question. If the party thus recognizing the officer *de facto* were

aware that such officer had some appointment or election, it would strengthen his belief, but without this he would be justified in believing that an authority publicly exercised and assented to was rightfully assumed. The definition of an officer *de facto*, as given by Lord Ellenborough in *The King* v. *Bedford Level*, 6 East, 356, which he generalizes from that of Lord Holt in *Parker* v. *Kett*, 1 Ld. Raym. 658, 660, is 'one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law;' and the above suggestions are in accordance with this definition. . . . It was shown in the present case that Farr was 'notoriously acting' as constable; having an office in Boston, and upon its door his name, with the addition of the word 'constable;' and as to third persons he must be deemed an officer *de facto*." See, also, to the effect that the official acts of a *de facto* constable are valid, *Doty* v. *Graham*, 5 Pick. 487; *Elliott* v. *Willis*, 1 Allen, 461. In *Coolidge* v. *Brigham*, 1 Allen, 333, 335, the court says:—"No rule of law is more firmly established than that which gives to the acts of such an officer the same efficacy and validity, so far as they affect third parties, as to those done by an officer *de jure*. His title or claim to the office cannot be tried in a proceeding to which he is not a party; nor can his authority to exercise its functions be called in question in a collateral proceeding. The reasons for this rule are obvious. It rests upon considerations of public policy, and the necessity of affording protection to those whose rights and interests may be affected by the official acts of persons exercising the authority and performing the duties of a public office under an apparent title to its possession and enjoyment. It would create great difficulty and embarrassment, and lead to irremediable confusion and mischief, if, in every case where an official act is essential to give validity to the rights of third persons, it could be invalidated and set aside by proof of some informality or defect in the appointment or election of the officer who performed it." And see *Bucknam* v. *Ruggles*, 15 Mass. 180; *Fowler* v. *Beebe*, 9 Mass. 231; *Alvord* v. *Collins*, 20 Pick. 418; *Sudbury* v. *Heard*, 103 Mass. 543. The rule applies to cases of all election officers. If they are officers *de facto* their acts are to be regarded as valid. *People* v. *Cook*, 8 N. Y. 67; *Keller* v. *Chapman*, 34 Cal. 635; *People* v. *McManus*, 34 Barb. 620; *Lippincott* v. *Paria*, 92 Ill. 24; *People* v. *Hilliard*, 29 Ill. 413; *Collins* v. *Huff*, 63 Geo. 207; *Harden* v. *Colquitt*, *Ib.* 588; *Ex parte Norris*, 8 S. Carolina, 408; *Lee* v. *State*, 49 Ala. 43. In Congress the cases of *Barnes* v. *Adams* in 1870, 2 Bartlett Congressional Election Cases, 760, and *Eggleston* v. *Strader*, *Ib.* 897, overruling the former precedents to the contrary, recognize and establish this rule in election controversies.]

HOUSE—COMMITTEE ON ELECTIONS, 1867.

Messrs. EDWIN WRIGHT of Boston, *Chairman*; EBEN F. STONE of Newburyport, GEORGE F. HOMER of Brookline, GEORGE A. BROWN of Worcester, ANDREW C. WOOD of Middleborough, HENRY S. WHEELER of Southborough, JOHN A. DALY of Boston.

JOHN F. ARNOLD *v.* JONAS A. CHAMPNEY.

House Document, No. 64. January 31, 1867. Report by EDWIN WRIGHT, *Chairman*, — EBEN F. STONE dissenting.

Mistake in Name of Candidate. Votes written and cast for "Jonas Champney" and "J. Champney" were counted for the sitting member, Jonas A. Champney, upon proof that, up to 1862, he had always called himself and been called "Jonas Champney," that his name had been so entered upon the voting list, and that he had voted and been assessed in that name, although his father, Jonas C. Champney, was eligible to election.

Irregularities in Election. Placing names upon the voting list in pencil after the polls were opened, in many cases with no other proof of the voter's qualification than his presentation of a tax receipt, examined and passed upon by a single selectman; receiving votes upon the mere showing of a tax receipt, and then entering and checking the name on the voting list; allowing four-fifths of the votes to be counted and certified by four citizens of the town, invited to that service by the selectmen, but not officers or sworn; allowing a citizen, not an officer or sworn, to preside over, and check names upon, and add names to, one of the three voting lists, were irregularities reported for the action of the house; but as, even if the vote of the town in which these irregularities occurred was thrown out, the sitting member would still have a plurality, the committee expressed no opinion upon the question, and reported that the petitioner have leave to withdraw.

JOHN A. ANDREW *for petitioner.*
GEORGE O. SHATTUCK *for sitting member.*

The Committee on Elections, to whom was referred the petition of John F. Arnold of Adams, that the seat now occupied by Jonas A. Champney of said Adams, as a member of the house of representatives from the second Berkshire representative district, may be awarded to him, having heard the parties, their witnesses and counsel, submit the following report: The second Berkshire representative district is composed of the towns of Adams, Cheshire, Clarksburg, Florida and Savoy, and is entitled to elect two representatives. The election of one of these representatives is unquestioned, and he occupies his seat in this body without objection.

The other certified representative is Mr. Jonas A. Champney, the present sitting member, whose right to occupy his seat depend upon two questions, viz.:

First. The disposition to be made of *eight votes*, to be hereafte specified; and

Second. The validity of the whole election of the said town o Adams, at the general election in November last.

Respecting the first question, it appeared that records were made by the town clerks of the several towns, of the names o persons voted for, for representatives, the number of votes receive for each person, and the title of the office for which he was pro posed, and that these were entered in words at length in such records. Gen. Stats., chap. 7, sect. 15.*

It appeared also, that transcripts of these records were made out, sealed up, and delivered by the proper officers to the clerks of the respective towns, who duly met, ascertained the persons elected representatives as shown by said transcripts, and that records of the complete returns of all the votes in the district were made in the books of records of the several towns of the district. Gen. Stats., chap. 8, sects. 10, 11, 12, 13.†

By these consolidated records it appeared that the votes cast for representatives were as follows, viz.: for

Shepard Thayer,	847
Jonas A. Champney,	684
John F. Arnold,	682
Peter Blackinton,	460
Fiske Arnum,	4
A. P. Butler,	1
D. F. Bucklin,	1
Return M. Cole,	1
N. P. Brown,	1
S. W. Bates,	1

So that upon the official records of the district, no question could arise affecting the right of Mr. Champney to hold the seat he now occupies as a representative of said district.

But it is admitted, that of the 684 votes shown by the records to have been given for Jonas A. Champney, six were written votes for "Jonas Champney," one was a written vote for "J. Champney," and one was a written vote for "Jonas C. Champney;" and

* Now Pub. Stats., chap. 7, § 26.
† Now Pub. Stats., chap. 8, §§ 8-16.

that these eight votes were all cast in the said town of Adams, where both the sitting member and the contestant reside.

It was in proof, also, that one or two votes were cast in said Adams for "J. F. Arnold," and that these were counted for and appear in the 682 votes shown by the said records as given for "John F. Arnold."

No evidence was presented to your committee tending to show by what persons any of these eight ballots were cast, or what the intentions of the persons casting them were.

But it was in testimony, and not disputed, that the present sitting member, Jonas A. Champney, before and up to the year 1862, when he entered the military service of the United States, had always called himself, and been called "Jonas Champney;" had written and received letters under that name; that his tax bills had been made out and presented to him from the selectmen of Adams in the name of "Jonas Champney," and paid by him under that name; that his name had been placed upon the voting lists of said Adams as "Jonas Champney," and that he had voted upon that name; that Jonas C. Champney was the name of his father, who was never called or known by the name of "Jonas Champney," and that, beside the father, Jonas C., and the son, Jonas A., there was no person to whom the names of "Jonas Champney" or "J. Champney" could apply; that since his entry into the army, the sitting member had used only his true name of Jonas A. Champney. Both the father and son were eligible to the office of representative.

If under these circumstances, the seven votes given for "Jonas Champney" and "J. Champney" should have been counted or should now be counted for Jonas A. Champney, then the sitting member is entitled to hold his seat against the petitioner.

Upon this question, the authorities are at variance. In the State of Michigan, under statutes quite like ours, in requiring the *name* of the person voted for to be designated on the ballot, it has been held in actions, in the nature of *quo warranto*, to try the right of parties to hold the offices of judge of probate and of sheriff, that evidence of the intention of persons voting at an election is not admissible. Such intention must be determined from the ballot alone, — that it was not competent to show, for instance, that "H. I." was intended for "Henry I.," or "J. A." for "James A.;" that, under a statute prescribing that votes shall be given by ballots "containing the *name* of the person," &c., "J. A." is not the name of James A., and a ballot with only the initials J.A. does not contain the name by written designation, by written characters, of

James A., and that *no evidence* is admissible to show that such a ballot was intended for James A.

Notwithstanding, where the designation of an individual on a ballot is by an abbreviation sanctioned by common usage, and universally understood, the ballot may be counted for the person for whom it was intended, and, it seems, that intention proved: thus, "Jas. A." may be counted for "James A." *People* v. *Higgins*, 3 Mich. R. 233; *People* v. *Tisdale*, 1 Doug. (Mich.) 59; *People* v. *Saxton*, 22 N. York, 311.

On the other hand, the course of decisions at law in New York and in this State, and the parliamentary practice of this Commonwealth, seem to have adopted the opposite rule. Thus, in the court of appeals in New York, it was held that votes for H. F. Yates were allowable, and to be counted for Henry F. Yates, if, under all the circumstances, the jury should believe they were intended for him, and that the intention of the voter might be proved by the elector himself, or by circumstances surrounding the election; in that case, that the person voted for had often subscribed his name, "H. F. Yates;" that he had formerly held the same office, and was at the time a candidate; that people would generally apply the abbreviation to him, and that no person was known in the county besides, to whom it could apply. A name, the Court say, is the discriminative appellation or designation of an individual. The abbreviations of Geo. and Hen. are not names, as George and Henry are, but are signs used for such names by common consent: that is to say, the intent, by the use of such an abbreviation, to point out a person bearing the full name, is proved by the common understanding; and that when an abbreviation less full is used, the intent (though it may not be inquired into by the board of canvassers or selectmen, who are but ministerial officers,) may be tried by a court and jury, as any other question of fact, and without any peculiar hazards of perjury or other evil results. *People* v. *Ferguson*, 8 Cowan, 102.

If such inquiries may be entered into by courts and juries who are to administer the strict letter of the law, *a fortiori* they are legitimate subjects of examination and decision by a body which possesses the ultimate and final power of determining the election and qualification of its own members, — and which, in giving effect to the expressed will of the great body of the voters in any constituency, is not necessarily limited by the strict technical rules that must prevail in trials at law.

The same doctrine is enunciated in the case of *The People v. Cooke*, 4 Selden, (N. Y.) R. 67. In Senate (Mass.) Document,

No. 4, for 1843 and Senate (Mass.) Document, No. 3, for 1840. In the case of *Collins v. Douglass*, 1 Gray, 167, the right to determine who is meant by a name, and that Peter was used for and instead of Peter G., by circumstances collateral to the name itself, was maintained. Peter G. Douglass was a poor debtor under bonds for the liberty of prison limits, and gave notice of his intention to take the benefit of the provisions of law, for the relief of poor debtors. His notice was signed Peter Douglass, omitting the initial G. of his middle name, and objection was made in an action on the bond, that his discharge was insufficient, by reason of the omission of the initial letter of the middle name of the debtor; and it was urged that Peter and Peter G. were the names of two different individuals; that the notice did not inform the creditor, that the person applying for the oath was his debtor, etc. But the Court say: "His name is not the only means it affords, by which he may be identified and known by the creditor. His profession and place of residence; the court wherein the original suit was prosecuted; the precise amount of the judgment against him, both in reference to damages and costs; the date of the execution, and the prison to which he was thereon caused by the plaintiff himself to be committed, are all accurately named and described. These circumstances are so direct and significant, that it is impossible to doubt that the creditor knew who was intended by the debtor named in the notice. This is sufficient."

So of a misnomer in the case of a deed, where the facts show a latent ambiguity, evidence may be given to prove that Hiram Gowing was used for Hiram G. Gowing, and in another case, it is clearly implied, that where such an ambiguity existed, even the name "James Maxwell" may be shown to have been used for George. *Peabody v. Brown*, 10 Gray, 45; *Crawford v. Spencer*, 8 Cush. 418.

In this case, there is existing the doubt, perhaps a latent ambiguity, as to the person for whom the votes "Jonas Champney" and "J. Champney" were given, as taken by themselves, equally applicable to Champney, father and son. If, therefore, they may be explained at all by any parol evidence. it would seem that such evidence might, in accordance with these decisions, be given to determine to which of the two they should be given, and for which counted, — and the committee are of opinion that these votes, under the circumstances stated, are to be counted for Jonas A. Champney.

Upon the second question, various testimony was produced, tending to show great irregularities in the manner of conducting

the election in Adams, on the occasion when these votes were cast. Your committee will only refer to such of them as in their judgment are clearly important, as affecting the regularity and purity of elections, and such only as were proved and not disputed.

It appeared, then, in the first place, that the names of nearly one-third of all the persons who voted in the town of Adams at that election, were entered upon the voting lists *in pencil*, after the polls had been opened, and while the voting was going on; in very many cases, this was done with no other examination or investigation as to the right of the person to vote, than his presentation of a tax receipt, which was taken, examined and passed upon by one of the selectmen, without consultation with his colleagues, and without their personal knowledge; and this, in a community composed largely of operatives, of uncertain and floating residency. In some cases, the vote was, in fact, deposited on the mere showing of the tax receipt, which was then passed over by the presiding officer to the person in charge of the check list, and then, for the first time, the name of the person who had voted was entered and checked. The presiding officer for this day was the chairman of the selectmen, and the petitioner in this case.

Gen. Stats., chap. 7, sect 9,* provides that "The presiding officers, at meetings held for the elections of town and other officers, shall be provided *with a complete list* of the persons qualified to vote at such election; and *no person* shall vote at an election, whose name has not been *previously placed* on such list, nor until the presiding *officers* find and check his name thereon."

Second. It was in evidence and admitted, that six boxes of votes were counted during the day — the last of which contained only about twenty votes; that besides this sixth box, only one box of votes was counted by the selectmen, or any of them, during the day, or at any time at all; while all the rest, amounting to four-fifths nearly, of all the ballots cast, were wholly counted and certified by four citizens of the town, who were invited to that service by the selectmen, and who were not sworn to that service, nor in any capacity sworn officers of the town.

Gen. Stats., chap. 7, sect. 15,† provides that "The votes in elections for national, state, county and district officers, shall be *received, sorted and counted by the selectmen*; and by the ward officers," etc.

Third. It was proved and admitted that one, at least, of the three lists, containing the names of legal voters, was presided over, and

* Now Pub. Stats., chap. 7, § 9. † Now Pub. Stats., chap. 7, § 26.

the names thereon checked, and other names added thereto, during the election, by a citizen of the town not an officer, and not sworn.

Gen. Stats., chap. 7, sect. 9, provides, "That no person shall vote, until the *presiding officers find and check* his name thereon."

It should be added that the selectmen were present, and in a position to take notice of and oversee all the proceedings of the election, and were a great portion of the day engaged personally in the discharge of some official duty.

These irregularities, as it is claimed they are, under the provisions of the statutes cited, are said to be sufficient to invalidate the whole election of the town of Adams, on the occasion referred to; and it is urged that it is the duty of the committee and of the house of representatives, for the great purpose of preserving the purity of the ballot-box, and of guarding against the acts of irresponsible persons, at such elections, to declare the said election entirely null and void.

However irregularly in fact this election was conducted, your committee have no reason to believe that there was anything but the best of faith in its conduct by those having it in charge, and they have no reason to believe that any person was in fact injured by what then and there transpired. And they have therefore thought it their duty to report the facts to the house, for such consideration as might become necessary, without themselves formally pronouncing upon them any opinion.

It is conceded that if the election in the town of Adams, on the day in question, was for any reason null and void, then the sitting member Mr. Jonas A. Champney, will be entitled to hold his seat by a plurality of from 20 to 25 votes.

In view, however, of the whole case as presented to them, your committee (Mr. Stone of Newburyport dissenting) submit as their conclusion, that the sitting member is entitled to hold his seat, and that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J. 1867, p. 98.]

SENATE AND HOUSE — 1868.

THOMAS RICE, JR., *v.* A. K. P. WELCH.

House Document, No. 11. January 15, 1868. Joint committee on returns of votes for councillors. Hon. DANIEL NEEDHAM, Hon. MARSHALL WILCOX and Hon. CHARLES C. DAME, of the senate; WILLIAM G. BATES of Westfield, WILLIAM HOWLAND of Lynn, WARREN WILLIAMS of Worcester, LEVI A. ABBOTT of Middleborough and SAMUEL T. FIELD, of Shelburne, of the house. — Mr. FIELD not signing the report.

Legislature can go behind Returns to ascertain Election of Councillor. Under the 16th amendment to the Constitution, regarding the election of councillors, and providing that the governor, with five or more councillors, shall examine the returned copies of the records of votes and issue his summons to such persons as appear to be chosen councillors, and that the secretary shall lay the returns before the senate and house of representatives on the first Wednesday in January, to be by them examined and the election declared and published, the senate and house of representatives have a right to go behind the returns of votes for councillor, and to correct any errors, especially if such errors are the result of fraudulent conduct.

Same. Burden of Proof. This right will be exercised only upon satisfactory preliminary proof of such substantial facts or well grounded causes of suspicion as would induce strong conviction that fraud or mistake, prejudicial to the contestant, might appear upon such examination; and in the absence of such preliminary proof, the returns of the city and town officials, as sworn officers, should stand as correct.

Same. Recount of Votes for Councillor refused. The mere statement that the contestant and others have strong reasons for believing that important errors were made in the return of votes, the correction of which would change the result; that the contestant was elected and a count of votes would so show; and the fact that the votes at the subsequent municipal election in Cambridge had been counted by the same persons who counted the votes for councillor, and in several cases errors were found in their count of votes at such municipal election, are insufficient reasons for a recount of votes for councillor.

The Committee of the senate and house of representatives, to whom was referred the returns of votes from the several districts for the choice of councillors, and to whom, also, was referred the petition of Thomas Rice, Jr., of Newton, praying that he may be declared to be elected, and be qualified, as councillor from the third district, instead of A. K. P. Welch of Cambridge, have considered the subject referred, and beg leave to submit their final report: The third councillor district consists of wards seven and twelve of the city of Boston, of the cities of Cambridge and Roxbury, and of twenty-four towns, in the counties of Norfolk, Middlesex and Worcester. The returns appear to have been duly made by the different recording officers: they were examined by a committee of the council, and upon this report it was declared that Mr. Welch appeared to have been elected.

The report of the council finds the following state of facts, in relation to the votes for councillor in the third district: —

The whole number of ballots was		20,981
which were cast for the following persons:		
"A. K. P. Welch" of Cambridge, ...	9,538	
"A. K. P. Welch" (no residence named), . . .	754	
		10,292
"Thomas Rice, Jr., of Newton,"	9,191	
"Thomas Rice, Jr., of Brookline,"	222	
"Thomas Rice, Jr., of Cambridge,"	1	
"Thomas Rice, Jr. (no residence named), . .	834	
"Thomas Rice of Newton,"	37	
"T. Rice" (no residence named), ...	1	
		10,286
"Orrin S. Knapp of Somerville, councillor for sixth district,"	299	
"John Jones of Cambridge, for sixth district," .	45	
"John Jones" (no residence named), . . .	25	
"Charles Adams, Jr, of North Brookfield," . .	28	
"J. W. Denton of Cambridge,"	1	
"Jonas Chickering of Grafton,"	1	
"George P. Carter" (no residence named), . .	2	
"Peter Harvey" (no residence named), . . .	1	
"May,"	1	
		403
Total, ...		20,981

This report of the committee of the council we find to be properly witnessed by the returns. It appears that A. K. P. Welch of Cambridge received a plurality of six votes over any other person voted for, and accordingly, if the returns show the true state of the votes, he was duly elected as councillor for the third district.

Thomas Rice, Jr., one of the persons voted for, having notified the clerks of said cities of Boston, Cambridge and Roxbury of his intention to contest the election of Mr. Welch, and having requested them to retain the ballots cast for such councillors, presented the petition which is referred to this committee, representing that he, and not Mr. Welch, received a plurality of six votes, requesting an investigation, and a hearing for the purpose thereof, and that, if it should be found that he was duly elected, he might be qualified as such councillor.

Inasmuch as the petition did not allege in what respects the returns failed to indicate anything different from the true facts as to the votes cast, the committee requested him to furnish them with a particular specification of the nature of the evidence, that they might be able to judge of the propriety of opening a door to

the admission of evidence which might, perhaps, involve not only protracted labor but great delay and expense. Mr. Rice, accordingly, at the next meeting of the committee, laid before them a specification, in which he refers to a letter, addressed to him by John S. Marsh and twenty-four others of Cambridge, of the date of Dec. 12, 1867, in which they say that they "have strong reasons for believing that errors were made in the return of votes for councillor;" and they request him to contest the seat of Mr. Welch. He also specified that citizens and voters in other cities in the district had informed him that they had good reasons for believing that important errors had been made, the correction of which would change the result, if the ballots should be examined. He further specified that the votes cast at the municipal election in Cambridge had been counted by the same persons who counted the votes for councillor, and that, in several cases, errors were found to have been reported; but he nowhere expresses his grounds of belief, or his belief, that such errors exist, in the whole of the specification, other than an opinion arising from the inference, that inasmuch as the officers of one or more wards in Cambridge had made errors in counting the votes at the municipal election, therefore they might have done so in counting the votes for councillor.

The committee promised to hear the views of the counsel of Messrs. Rice and Welch, upon the subject-matter of said petition; and they subsequently requested him to specify more particularly the facts relied on by him. He therefore furnished the committee with a second amended specification, in which he set forth his belief that the returns in wards seven and twelve, in Boston, and from the several wards in the cities of Cambridge and Roxbury are erroneous; that he, and not Mr. Welch, was elected, and that a count of the votes preserved in said cities, together with such other evidence as might "be requisite," would establish such a conclusion.

The case presented is one of great difficulty, as cases of statutory or constitutional construction usually are. The sixteenth article of amendment of the Constitution of Massachusetts provides for the number of councillors, the districting of the Commonwealth for the choice, the day and manner of election, and the mode of filling the vacancies; and, to guard against delay in the organization of the government, it provides for the examination of "the returned copies of the records" of the votes by the governor and at least five councillors, and a summons by the governor of those councillors who appear to be elected, to appear for qualification on the first Wednesday of January. The article further provides that the Secretary of State "shall lay the returns before the senate and house of representatives," on that day, "to be by them

examined;" and, in case of an election, "the choice shall be by them declared and published."

The Act of 1863, chap. 144, as it is claimed, relates to this case. It certainly speaks of "all elections, held within the cities" of the Commonwealth, and provides that all ballots shall, after their count, be sealed up, and properly labelled and certified, and then transmitted to the city clerk, to be kept not less than sixty days. If, within the time of forwarding returns, or declaring the results of an election, ten or more citizens of any ward shall declare their belief of a mistake in a count, "and shall specify wherein they deem them in error," the clerk shall keep the votes, notify the mayor and aldermen, who shall recount the votes of the ward, and cause any mistake which may have been made to be rectified by the clerk, according to their directions; and if within sixty days a candidate shall give notice of a contest for the office, the vote shall be kept by the clerk, subject to the order of the body to which such person shall claim an election.

This being the legislation upon the subject, it is contended by Mr. Rice that it is our duty to grant him the examination he demands; to obtain from the city clerks the votes cast in the cities of Cambridge and Roxbury, and the two wards in Boston; and if, upon a count, it should appear that there has been a mistake in those returns, of a number sufficient to exceed the plurality of Mr. Welch, to declare him to be duly elected. On the other hand, Mr. Welch protests against our right to open the count, or go behind the returns. He contends that the Constitution gives no such power, and that the statute contemplates an appeal from the count of the ward officers, to the mayor and aldermen, whose decision is to be final, as is that of the ward officers, in case no appeal is taken; and, inasmuch as towns are not required to retain the votes cast, he alleges that it would be unequal and unjust to annul an election on the discovery of an error in the vote of a ward in a city, when counterbalancing errors might be discovered in the returns of towns, if their votes had also been retained for examination.

Upon a full consideration of the subject, the committee are of the opinion that they have the right to go behind the returns, and to correct any errors. Especially have they this right if these errors are the results of fraudulent conduct, and they do not believe that the article of amendment intended to provide that the governor of the Commonwealth and at least five of the executive councillors should go through the special task of adding up and comparing the returns of the votes, and declaring what councillors *appear* to be elected; and then, that a committee of the senate and house should examine the same returns only, and report that those high func-

tionaries had footed up the returns correctly, and that what had *appeared* to them to be right, was right in fact. It appeared to this committee to be a much more natural construction, that, for the purpose of preventing delay in the organization of the government, as the article itself expresses it, the governor and council should certify the apparent choice of the candidates, and then that, in case of a contest, a trial and hearing should be had of the real facts in controversy, before a disinterested body,—the legislative branches of the government.

But the committee are of the opinion that the exercise of the right to go behind the returns is allowable only upon satisfactory preliminary proof of such substantial facts or well-founded causes of suspicion, as would induce strong conviction that fraud, or mistake, prejudicial to the contestant, might appear upon such examination; and that, in the absence of such preliminary proof, or even of an allegation thereof, the returns of the city and town officials, who are sworn officers, should stand as conclusive.

The adoption of a contrary theory would leave it open to a defeated candidate to demand of the legislature a minute examination of all the votes and the circumstances of an election, involving almost endless issues, requiring days and weeks, and perhaps, an entire session, although the contestant might not be able to state a single fact indicative of mistake, error or fraud.

In the case before us there has been no averment or proffered evidence of any distinct, independent or substantial facts, convincing us of the probability of frauds or errors in the return copies, prejudicial to the contestant.

It will be observed that the committee of the council, in their report of the apparent result of the election, allowed to the contestant all votes cast for Thomas Rice, Jr., of Newton, described also as of Brookline and of Cambridge.

The correctness of this disposition of the votes is extremely doubtful, but the committee have not thought proper to come to an adjudication upon the subject.

The committee, therefore, respectfully report that it appears to them that A. K. P. Welch of Cambridge is elected councillor from the third councillor district, and that Thomas Rice, Jr., the contestant, have leave to withdraw.

[The report of the committee was accepted. H. J., 1868, pp. 34, 35, 40, 41; S. J., 1868, pp. 39, 40.]

SENATE—1868.

GILBERT WAIT ET AL. *v.* MELVILLE E. INGALLS.

Hon. SAMUEL W. BOWERMAN, Hon. WM. GASTON, Hon. WM. SCHOULER, Hon. CLARK PARTRIDGE and Hon. HARRISON TWEED, *Special Committee.*

Senate Document, No. 146. March 31, 1868. Report by Messrs. GASTON, SCHOULER and TWEED, — Mr. BOWERMAN dissenting.

Eligibility of Senator. Inhabitancy. Upon the question whether a senator had been an inhabitant of the Commonwealth for the space of five years immediately preceding his election (Nov. 5, 1867), it *appeared* that he was born in Maine and came to Massachusetts in September, 1862, where he entered the law school in Cambridge, his name being catalogued as of Maine. At the time he was under age, but had obtained his freedom from his father, and brought all his effects with him, intending to live and practise law in Massachusetts. He was admitted to the bar there, Nov. 1, 1862, upon his petition, in which he stated he was a citizen of that Commonwealth. In February or March, 1864, he went to Gray, Me., and remained there until the following October, teaching school and opening an office for the practice of law, boarding at a hotel, and leaving all his personal effects, except those needed for use, in Boston; he was elected a member of the school committee in Gray, Me., soon after his arrival, the claim being made that citizenship there was not a necessary qualification for that office. He paid a tax there under protest that he was not liable. He furnished in Portland, not supposing it affected his domicile, a substitute in the army, which was credited to Gray, and for which that town voted $50. He voted in Gray in 1864, under the belief that he could do so while still retaining his domicile in Massachusetts. He intended all the time to return to Boston to practise law, was waiting for a promised position in a law office there, and returned to Boston as soon as he obtained it. It was ***held***, under the circumstances, that he had been an inhabitant of the Commonwealth for such space of five years and was eligible to election.

R. M. MORSE, JR., *for petitioners.*
BENJ. DEAN *for sitting member.*

This case was submitted to the committee upon the following statements of the parties, without further evidence:—

IN BEHALF OF PETITIONERS. — Melville E. Ingalls was born at Harrison, in the State of Maine, Sept. 6, 1841. His father then was, and since has been, an inhabitant of that place. In September, 1862, he entered the law school at Cambridge, in this State, as a student, giving his residence to Professor Parker, on the 17th of that month, as Harrison, Me., and it was so recorded

by the professor. On the 22d of September, Mr. Ingalls presented to the college steward Professor Parker's certificate that he was admitted to the law school, on giving the bond, or making the deposit, as prescribed by the laws of the college, and there stated to the steward, by whom it was at that time recorded, that his residence was at Harrison, Me., and his room in Ramsay's Block, Cambridge. The college catalogue for that term stated his residence and lodging-room in the same way.

Nov. 1, 1862, at the term of the supreme court held in Cambridge, he was admitted to practise in the courts of this State. His petition for admission, signed by himself, described himself as of Cambridge, and represented that he was an inhabitant of this Commonwealth.

A separate catalogue of the law school was published in March of the following term. This was prepared by one of the students, the librarian of the school. After the proof-sheets were ready, one of the professors notified the students that they had opportunity to correct any mistakes in it. This catalogue stated the residence of Mr. Ingalls to be Harrison, Me., and his room to be in Ramsay's Block.

Mr. Ingalls received the degree of LL.B. at the law school in July, 1863. The rules of the college provide that a degree shall be granted only to students who have attended three terms of the school; but if they have been admitted to practise as an attorney, they are entitled to it, after they have attended two terms. Mr. Ingalls' name was at no time on the voting list in Cambridge, nor was he ever assessed, nor did he ever vote or pay a tax there. In April, 1863, he left his room at Ramsay's Block, and thereafter boarded with his brother, Dr. Ingalls, in South Boston, attending the law school, however, till the end of the term. After that time he had no regular occupation, until, in February or March, 1864, a few days before the spring election, he went to Gray, in the State of Maine. There he resided till the conclusion of the town meeting hereafter referred to, Oct. 15, 1864. At the town meeting in March he was elected one of the superintending school committee, accepted the office, and entered upon its duties. In the spring and autumn he taught the high school in the place. He opened a law office, put out his sign, and did business as a lawyer there.

In April, 1864, he was taxed by the assessors of Gray, a poll tax and a tax on his personal property (income from his profession), and subsequently paid the tax. His name was on the check list of voters in the town, made up and certified by the selectmen

on the 8th of August, 1864, and he voted at the State election, Sept. 12, 1864.

On his own application to the provost-marshal in Portland, he was enrolled in the militia of Gray for the purpose of furnishing a substitute; he furnished a substitute in July or August, 1864, and at a town meeting held Oct. 15, 1864, the town voted to pay him fifty dollars towards his expenses thereby incurred. He also was enrolled in Boston in 1863. Until 1865 he was not assessed in Boston, nor was his name upon the voting list, nor did he pay taxes or vote there.

In behalf of Sitting Member. — In the case of Melville E. Ingalls, — without admitting the truth of the facts certified in the statement of Mr. Morse, — we consent that Mr. Ingalls' eligibility to the office he holds, may be tried on that statement and the following: —Mr. Ingalls' father is a farmer in the town of Harrison, in Maine, his farm being a poor one, and the land hard to cultivate. He gave his son, Melville E. Ingalls, his time, some time before his arrival at majority, and he ever after depended on his own exertions for support; and when the latter came to Massachusetts, he brought with him all his worldly possessions, consisting of his books, wearing apparel, and money he had earned to enable him to pursue his studies. He had been preceded by his two brothers, who were all his family connections except his father, and when he left home he left for good, with the intention of making Massachusetts his future residence At Cambridge, when he first arrived, he doubtless did describe himself as from Harrison, Maine, but remembers none of the details stated by the other side, with reference to the catalogues, steward, etc., and his attention was not called to the preparation of the catalogue of 1863.

With reference to his stay in the town of Gray, it should appear, that he was elected a member of the superintending school committee, on the Tuesday after his arrival in the town, and that at the town meeting, it was urged by his opponents, that he was not a citizen and therefore ineligible, and by his friends, that it was immaterial whether he was a citizen or not, and that citizenship was not a necessary qualification. The school he opened was for a term of eight weeks. It was a private school, which he advertised in order to obtain scholars, and called it a high school, because he taught higher branches than were taught in the town schools. The advertisement was merely for the term of eight weeks. After the close of the school, he came to Boston and renewed the efforts, hereafter mentioned, to obtain a situation where he might enter upon the regular practice of his profession.

During this visit, he was promised a situation in the office of Messrs. Woodbury & Andros, as soon as Mr. Andros, who was then ill, was able to attend the making of the necessary arrangements, — the supplying of the office with assistants being by Mr. Woodbury, left to the discretion of Mr. Andros. Leaving it with his brother to write him, he returned to Gray and received a letter from his brother, that Mr. Andros thought he had better wait till the active commencement of business in the fall. Mr. Ingalls accordingly went to Harrison, assisted his father at haying, and returned to Gray, and advertised for scholars for a term of ten weeks. About the 10th of October, 1864, he received a telegram from his brother, to come to Boston at once. He immediately closed up his school, and arrived in Boston on the 17th day of October. Before he went to Gray at all, he had made efforts to obtain a situation in Boston, and at all times intended to return to Boston, where his brothers were, and only went to Gray to earn some money to enable him to carry out his designs for the prosecution of his profession in Boston. At Gray, he boarded at the hotel, and paid $1 (one dollar) a month for office rent. He took with him to Gray, only the things he most needed, leaving his other property at his brother's house in Boston. He objected to paying his taxes at Gray, and only paid them the day he left the town. The proceedings of his admission to the bar may be handed to the committee. He was never admitted to the bar in the State of Maine. As to furnishing a substitute, he was enrolled in Boston in 1863; and in 1864, being in Portland, he was asked in the street by a man, if he wanted him as a substitute. On the impulse of the moment, he accepted the proposition, and went directly to the office of the provost-marshal in Portland, where he had the substitute accepted and himself enrolled, for the object of completing the entries and saving the expense of bringing the substitute to Boston, and the danger of losing him; and received a certificate of exemption from draft anywhere, for three years. The provost-marshal was from Gray; and, as this was the only voluntary substitute that was accredited to Gray, the town voted $50. And said transaction had, in his own mind, no reference to the question of domicile or citizenship, but to meet his duty of furnishing a substitute for the war. Mr. Ingalls voted at Gray, believing that he had a right to do so, under the constitution of Maine, by virtue of three months' residence there, though he still had a domicile in Massachusetts, and believing that voting did not affect his place of domicile.

Mr. Ingalls was elected by a majority of 669 votes.

THE COMMITTEE reported as follows: —The committee to whom was referred the petition of Gilbert Wait and others, inhabitants and voters in the sixth Suffolk senatorial district, requesting that the seat of Melville E. Ingalls may be declared vacant and a new election ordered, respectfully submit the following report: The case was presented to the committee, upon the written statement signed by the attorney of the petitioners and by the attorney of the respondent, herewith submitted The committee were much aided in their deliberation, by the very lucid and able arguments of the counsel of the respective parties.

The first question that presented itself to the committee was, "Did Mr. Ingalls acquire a domicile in, or become a resident of Massachusetts prior to November 5, 1862?"

It appears from the written statement that Mr. Ingalls was born in Harrison, in the State of Maine, on Sept. 6, 1841; that he came to Massachusetts in September, 1862, and entered the law school at Cambridge. The committee were of the opinion that he left Harrison with the intention of abandoning his domicile there; that he went to Cambridge for the purpose of completing his legal education, and that he intended to prosecute his profession in Massachusetts. These facts left no doubt in the minds of the committee that Mr. Ingalls did become a resident of Massachusetts prior to Nov. 5, 1862. This opinion was strengthened by the fact that on the first day of November, 1862, Mr. Ingalls presented to the supreme judicial court of this Commonwealth a petition to be admitted to the bar, in which he represented himself to be an inhabitant of this Commonwealth; that on this petition he was admitted to practise as an attorney and counsellor-at-law in all the courts of the Commonwealth. The committee, therefore, having readily arrived at the conclusion that Mr. Ingalls became an inhabitant of this Commonwealth prior to Nov. 5, 1862, come to the consideration of the remaining question, viz.: "Whether the domicile or residence thus acquired continued up to Nov. 5, 1867?"

Mr. Ingalls has actually resided in Massachusetts since September, 1862, with the exception of a period from February or March, 1864, to Oct. 17, 1864. The petitioners claim that Mr. Ingalls lost his domicile or residence in Massachusetts, in consequence of certain acts done by him during his absence from this State. These acts are mentioned in the agreed statement of facts, which accompanies this report. These acts, taken alone and unexplained by the attendant circumstances, would undoubtedly be strong evidence to prove that Mr. Ingalls did intend to abandon his domicile or residence in Massachusetts; but the committee do not regard any

of them as conclusive upon the question. They are satisfied, upon the whole evidence, that Mr. Ingalls came to Massachusetts in September, 1862, with the intention of establishing a permanent residence here; that his absence was (and was by him then intended to be) temporary; and that he never lost his domicile or residence in this State. Mr. Ingalls declares that his intention to remain in Massachusetts has been constant and uniform. His acts, subsequent to his absence, have been in entire conformity with what he now declares to have been his intention preceding and during his absence, and the committee are satisfied that his declaration is true; and believing that Mr. Ingalls was an inhabitant of this Commonwealth for five years next preceding his election as senator, they recommend that the petitioners have leave to withdraw.

[The report of the committee was accepted by a vote of 29 yeas to 5 nays. S. J., 1868, p. 237.]

HOUSE—COMMITTEE ON ELECTIONS, 1868.

Messrs. LINUS M. CHILD of Boston, *Chairman;* HEMAN B. CHASE of Yarmouth, PHILO CHAPIN of Granby, DAVID CUSHING, 2D of Hingham, MOSES POOL of Rockport, WALTER S. SPRAGUE of Taunton and WINDSOR N. WHITE of Winchendon.

HENRY P. TRASK *v.* JOHN MCDUFFEE.

House unprinted — 1868. Report of LINUS M. CHILD, *Chairman.*

[In this case, arising from the election in the Ninth Middlesex District, the petitioner introduced evidence tending to show that the votes cast for representative were improperly counted. At the request of all parties, the votes were recounted by the committee, and it was found and reported that the original count by the election officers was substantially correct, so that the sitting member was entitled to his seat. The report of the committee was accepted. H. J., 1868, p. 60.]

JACOB B. SHAW *v.* LEVI A. ABBOTT.

House Document, No. 59. February 12, 1868. Report by LINUS M. CHILD, *Chairman.*

Qualification of Voters. Residence. Where a voter, who was a school teacher in Middleborough, notified the school committee in July, 1867, that he should not remain longer unless his salary was raised, and, upon a refusal to raise it, had a farewell gathering and took formal leave of his pupils and went to Maine, where he arranged to enter a lawyer's office, and in the latter part of August, upon invitation from the school committee, who had been unable to find a teacher to supply his place, returned to Middleborough, having obtained a release from his employer, and resumed his school there, it was *held* that by his removal to Maine he changed his residence and was not entitled to vote at the election of 1867.

Same. Where a voter, who had lived in Middleborough with his father, owning real estate there, went to New York in the fall of 1866 to engage in business, intending to remain as long as business was good, and was called back by the illness of his father in June, 1867, it was *held*, upon his statement, that he had no intention of changing his home, but intended to return, that he was a resident of Middleborough, and qualified to vote at the election of 1867.

Same. Where a voter, who had been living with his wife at his father's house in Middleborough, went to Hudson in the fall of 1866 to get work, and stayed there eight months with his wife, boarding for a time and afterwards keeping house, paying his tax in Hudson for 1867, but not intending, as he said, to make his home there, but to stay there while he could get work, and returned to Middleborough in June, 1867, it was *held* that he was not qualified to vote in Middleborough at the election of 1867.

Same. Pauper. A voter, who, for some three months previous to Sept. 23, 1867, had been assisted by the town to the extent of $23, on account of his wife's sickness, and had, eight years before, received $45, when four of his children died in one month, which latter sum he had repaid, and after September 23d had not been assisted, and was able, if well, to take care of himself, was *held* not a pauper, and his vote should be counted.

Same. A voter in Middleborough, living with a woman not his wife, who had two children, was able to support himself, but the woman was unable to support herself, and the town of Carver, in which they all had a settlement, employed a neighbor to give him and his family $1.50 per week, which was regularly paid to them, mostly in provisions; it was *held* that he was a pauper and not qualified to vote.

Double voting. Where two votes for the same candidate were found folded, and so close together that it could hardly be discerned that there were two, and they were laid aside by one of the selectmen, with the intention of calling the attention of the selectmen to them, and afterwards, having become mixed with other votes, were both counted, it was *held*, upon the evidence, that one vote should be rejected.

The Committee on Elections, to whom was referred the petition of Jacob B. Shaw of Middleborough, claiming the seat now occupied by Levi A. Abbott, a representative from the Plymouth

district, would respectfully report: That, in consideration of the numerous and delicate questions presented in the investigation of this case, they have concluded to present the evidence to the house, that they may understand the matter.

It appeared in the hearing of this case that, at the regular election in November, the selectmen of the town of Middleborough declared that the vote for representative from that town was a tie vote; and that a second election was held, in which Levi A. Abbott, the present occupant of the seat, was declared elected.

The petitioner, Jacob B. Shaw, petitions for the seat on the ground that by the first election he was elected, and to sustain his petition offered the following evidence. It was shown to the committee, that at the first election, one Mitchell voted for Mr. Abbott, and it was claimed that he had no right to vote, for the following reasons. Said Mitchell had been a school teacher in Middleborough, and at the close of the term in July, 1867, he informed the committee of the school that he could not longer remain as teacher, unless they raised his salary, in a manner proposed by him. The committee refused to accede to the proposition. There was a farewell gathering had, and the teacher took formal leave of his scholars, and the town of Middleborough, and went to Farmington, Maine, and made an agreement with a lawyer there to remain in his office to study law, and perform certain duties. It also appeared, that when he went to Farmington he had no intention of returning at all, and had settled in Farmington for the present. In the latter part of August, the committee, having tried in various directions to procure a teacher for the school, and being unable to do so, and two individuals having offered to defray the additional expense, the said Mitchell, having procured a release from his employer, returned to Middleborough and taught the fall term of the school. The committee were unanimously of the opinion that said Mitchell had no right to vote.

It was also proved that one Standish voted for Mr. Abbott, and that he had not paid a tax assessed within two years.

The committee were unanimous in the opinion that his vote should be thrown out.

It also appeared that one Phinney, who voted for Mr. Abbott, had lived at Middleborough with his father; that he owned real estate in said town, and in the fall of 1866 he went to New York State to engage in the business of shoemaking; that he went with the intention of staying as long as business was good, but was recalled home by the sudden illness of his father about eight months afterwards, arriving home in June, 1867. He testified

that he had no intention of changing his home, but intended to come back to Middleborough.

The committee were not unanimous on this case, but the majority thought he had a right to vote.

The remonstrants then introduced testimony and proved that one Wood left Middleborough in the fall of 1866, and went to Hudson in this State; that previous to his departure he had lived with his wife at his father's house in Middleborough; that he went to Hudson to get work; that he stayed there about eight months with his wife; the first part of the time he boarded, and the last part of the time he kept house; that he had no intention of making Hudson his home, but only to stay there while he could get work; that he came back to Middleborough in June, 1867; that he paid a tax for 1867 in the town of Hudson.

The committee were divided on this case, a majority thinking he had no right to vote in Middleborough. He voted for Mr. Shaw.

It was also shown that one Cobb, who lived in Middleborough, for some three months previous to Sept 23, 1867, had been assisted by the town to the extent of twenty-three dollars on account of the severe sickness of his wife, who died Sept. 23, 1867; that he had some eight years before, been assisted by the town to the extent of about forty-five dollars, when he lost four children in one month, which amount he had repaid to the town. It appeared that since September 23, he had not been assisted, and was able, if well, to take care of himself. It was claimed that he was a pauper, and his vote should not be counted. He voted for Mr. Shaw.

The committee were unanimous in the opinion that he was not a pauper, and his vote should be counted.

It was also shown that Edward Dunham had lived in Middleborough for eight years; that he lived with a woman, who had two children, and who was not his wife; that Dunham earned sufficient for his support; that the woman was unable to take care of herself; that they all had a settlement in the town of Carver; and that said town employed a neighbor to give to Edward Dunham and family $1.50 per week, which was regularly paid to them, in the way of provisions mostly.

The committee were divided on this case, but the majority thought that Dunham was a pauper, and his vote should be thrown out. He voted for Shaw.

It was also proved, that after the votes were put in a box and turned from the box into a basket, that when taken out of the basket two votes that were folded together were found by one selectman, and shown to the rest; and that the votes were close

together, so that it could hardly be discerned that there were two. That the two votes were not creased together, but folded in such a manner that if they were thrown by one person it was evidently accidental. The matter was called to the attention of the selectmen, and the two votes were laid aside by one of the selectmen, who testified that he intended to call the attention of the board to them, but the votes having become mixed with the others were both counted. These votes were for Shaw.

The committee were divided on this, a majority thinking one vote should be thrown out.

Under these facts, the petitioner claimed that Mitchell and Standish, who voted for Mr. Abbott, ought not to have voted; that Phinney, who went to New York, and Wood, who went to Hudson, stood in the same position, and would offset each other. Also, that Dunham and Cobb were not paupers, and had a right to vote; and that as to the double vote, the selectmen having examined it and having decided to count it, that the committee, not having seen the votes, should not reverse the decision of the selectmen, on a question of this sort, without very strong evidence.

And thus that Mr. Shaw was at the first election elected by a plurality of two.

The remonstrants claimed that Mitchell, having been absent from Middleborough only eight weeks, did not lose his right to vote; that Phinney did not lose his residence by going to New York; but that Wood, who took his wife to Hudson, did lose his residence.

Also, that Dunham and Cobb were paupers and could not vote, and that one person threw two votes, and one of them should be thrown out. And hence Mr. Abbott was elected by a plurality of three votes.

Under these facts and claims, and in consideration of the closeness of the case, the committee have concluded to submit the facts of the case to the house, and have instructed the chairman to report that a majority of the committee give the petitioner leave to withdraw, and that Mr. Abbott has a right to the seat now occupied by him.

[The report of the committee was accepted. H. J., 1868, p. 134.]

HOUSE—COMMITTEE ON ELECTIONS, 1870.

Messrs. CHARLES H. MERRIAM of Leominster, BAINBRIDGE HAYWARD of Milford, JOHN E. FITZGERALD of Boston, FRANCIS EDSON of Hadley, NOAH RANKIN of Erving, WILLIAM H. WORMSTEAD of Marblehead, and JOHN RHODES of Millbury.

IN RE DAVID S. DRAPER.

House Document, No. 38. February 1, 1870. Report by C. H. MERRIAM, *Chairman.*

Representative not qualifying. Seat vacated. Where a member elect of the house failed to qualify, and, after an order of the house that the committee ascertain whether he intended to qualify, and if he did not, to consider the expediency of declaring the seat vacant, an invitation was sent to him by the committee to state his intention, to which he made an indefinite answer, the house declared the seat vacant and ordered a new election.

In this case the Committee on Elections were directed by the order of the house, dated Jan. 20, 1870, to ascertain whether David S. Draper of Great Barrington, the member elect from the seventh Berkshire district, intended to be qualified and to take his seat in the house, — and if not, to consider the expediency of declaring the seat vacant and of ordering a new election. The committee under this instruction enclosed a copy of the order of the house to Mr. Draper, and notified him in a letter dated Jan. 20, 1870, that they would be ready to hear, at any time on or before the 27th day of January, any communication he might have to make on the subject. In reply to this communication Mr. Draper wrote to the chairman of the committee, Jan. 24, 1870, as follows: —

DEAR SIR: — I duly received your letter of the 20th inst., with copy of order therein enclosed.

Business engagements will prevent my giving the required attention on or before the time indicated, but will do so as soon thereafter as possible. Yours respectfully, DAVID S. DRAPER.

The committee thereupon reported: —

The Committee on Elections, to whom was referred the order of Jan. 19, 1870, relating to "the seat of the member elect from the seventh district of the county of Berkshire," have attended to the matter and report that, on the 20th day of January instant,

they forwarded by mail to David S. Draper, the member elect for said district, a copy of said order, with a letter enclosed; that on the 28th day of said January, they received a letter from said Draper in reply, which said last-named letter is herewith submitted; that the letter of said Draper, appearing to be entirely indefinite as to the course which he proposes to pursue in the premises, as well as to the time when the house may expect a decision from him, whether he will appear and qualify or not, and nearly a month of the session having already passed with the district unrepresented, it would seem as if justice to the district, and a proper regard to the enforcement of the rule requiring the members to be present, and of the right of the house to have those present who have been elected as members and control the right to the seats, demand immediate action in the case. They therefore report the accompanying resolution and order.

[The resolution declared the seat of said Draper vacant. H. J., 1870, p. 83. The resolution was adopted, and a precept issued for a new election. *Ib.*, p. 93. Herbert C. Joyner was elected to fill the vacancy, and was qualified and took the seat. *Ib.*, 212.]

Henry T. Holmes *v.* Andrew L. Haskell.

House Document, No. 163. March 10, 1870. Report by C. H. Merriam, *Chairman.*

[In this case the petitioner claimed the seat as representative from the thirteenth Suffolk district, occupied by the sitting member. The committee found that one ballot cast, which had the name "H. T. Holmes" upon it, for representative, should be counted for the petitioner, Henry T. Holmes of Chelsea. By counting this vote for him the election, upon the returns, resulted in a tie vote between the petitioner and sitting member. But other evidence, not reported, in regard to the voting and counting, showed that the petitioner did not receive a plurality of votes at the election, and was not entitled to the seat. The committee thereupon reported that the petitioner have leave to withdraw, and the report was accepted. H. J., 1870, p. 255. Daniel W. Gooch appeared for the sitting member.]

GILMAN M. PALMER *v.* JONAS E. HOWE.

House Document, No. 185. March 15, 1870. Report by Messrs. MERRIAM, HAYWARD, EDSON, RANKIN, WORMSTEAD and RHODES,—Mr. FITZGERALD dissenting.

Practice in Election Controversy. Petitioner can file Specifications setting out new Allegations. Under a general allegation, in a petition for the seat, that the petitioner received a plurality of votes cast, he can file specifications before the committee, setting up fraudulent conduct on the part of the selectmen of certain towns in the district, and claiming that by reason thereof the entire vote of those towns should be rejected, so that he would have a plurality of all the remaining votes cast in the district.

Evidence. Voter need not state for whom he voted. A voter cannot be compelled to disclose, either directly or indirectly, the character of his vote, when voting by ballot, and he cannot be required to testify before the committee for whom he voted, nor to what party he belonged.

Same. This exemption from obligation to disclose the character of his vote, or for whom cast, is a personal privilege which can be claimed only by the voter himself, and the question can therefore be put to the witness, and if he sees fit to answer, there is no objection to the testimony.

Same. Evidence how Person voted. Upon the question for whom a person voted, evidence of persons seeing the ballot cast, statements of the voter to other persons as to how he had voted, and evidence that the voter was generally reported to belong to a certain political party, were admitted as competent.

CHARLES G. STEVENS and A. A. RANNEY *for petitioner.*
JOHN T. DAME and EDWARD AVERY *for sitting member.*

The Committee on Elections, to whom was referred the petition of Gilman M. Palmer of Clinton, praying to be allowed a seat in the house as member from the seventh Worcester district, and that the certificate granted to Jonas E. Howe be declared invalid, having heard the petitioner and said Howe, and having considered the matter, a majority of the committee submit the following report: The claim of the petitioner in this case in his petition is, that at the annual election held Nov. 2, 1869, Jonas E. Howe, the sitting member from the seventh district of the county of Worcester, had but nine votes more for representative than he did; that more than ten of the persons who voted for said Howe were not qualified to vote at said election; and that he, the said Gilman M. Palmer, received a plurality of all the votes of qualified voters cast at said election, and was therefore elected; and for this reason asks that the certificate of election given to said Howe be declared

invalid, and that he may be allowed a seat as a member of the house.

On motion made by counsel for the sitting member, the claimant was ordered to file a written specification of the grounds on which he claims the votes for said Howe to be illegal, and he did file a set of specifications, in which he claims that more than ten persons, who could not read or write, voted for said Howe, and who were not within, and of, the exceptions contained in the twentieth article of the amendments of the Constitution of this Commonwealth; that more than ten persons voted for said Howe at said election who were not residents of the towns in which they so voted; and that more than ten persons voted for said Howe at said election who had not paid a tax assessed upon them in this State within two years next preceding the election named.

In the course of the trial the claimant's counsel offered to show that the selectmen of Northborough and Clinton, two of the towns composing said district, had acted so fraudulently in making up the voting lists for said election, and in the management of the elections themselves, in these two towns, that the entire vote of the two towns should be thrown out and discarded; and that the claimant, having a plurality of the votes cast in Berlin, the only remaining town, was entitled to the seat. This evidence was objected to because there was no allegation of fraud in the petition. Whereupon the counsel offered to file specifications setting up the fraud, but the counsel for Howe objected to the filing of the specifications. The committee, however, allowed the specifications to be filed, and the evidence to be introduced, upon the ground that there was a general allegation that the petitioner received a plurality of the votes cast, and if the votes of these two towns were discarded he would have a plurality of all the remaining votes cast in the district.

Under this last specification a large amount of testimony was introduced by both parties; but the committee, after a full consideration of the matter, are unanimously of the opinion that, while there were some acts on the part of the selectmen of these towns which were clearly illegal, and others which were irregular, there was no such evidence of fraud as would warrant the committee in recommending that the vote in these towns be thrown out, and the seat given to the claimant on the vote of a single town, representing but a mere fraction of the district.

Under the first specification filed, the committee are unanimous in finding, from the evidence, that two persons voted in the town of Northborough, at the election referred to, who were not at the time

residents of that town; but they also find that one of these persons voted for each of the parties contesting the election, so that the result is not affected thereby. The committee also find, unanimously, that one person voted in Clinton at said election, who had not paid a tax assessed upon him in this State within two years next preceding said election, as required by law; and that fifteen other persons, all naturalized Irishmen, who could not read or write, and who were not within any of the exceptions in the twentieth article of the amendments to the Constitution of the Commonwealth, had also voted for representative in Clinton, at said election.

These sixteen persons all appeared before the committee, and the counsel for the claimant proposed to ask them for whom they voted for representative at the election named, and on the first one called, declining to answer the question for whom he voted for representative in Clinton at the last election, asked the committee to require him to answer. The committee declined to make the requirement, on the ground that the voting being by ballot, it came under the rule laid down in section 199 of Cushing's Law and Practice of Legislative Assemblies, and adopted, not only for the government of the house, by its seventy-second rule, but for its committees on elections as well. The witness was then asked to what party he belonged, but he declined to answer; and the committee ruled that this came under the same rule, and that a voter could not be *compelled* to disclose, either directly or indirectly, the character of his vote, when voting by ballot. The committee also ruled that this exemption from being required to disclose the character of the vote, or for whom thrown, was a personal privilege which could only be taken advantage of by the voter himself, and that the question might, therefore, be put to the witness, and if he saw fit to answer there was no objection to the testimony. Two of these sixteen persons answered the question, one stating that he voted for Howe and the other, for Palmer. The others all declined to answer. This left fourteen votes without any evidence for whom they were cast. In two cases, it was proved, by those who stood by at the polls and saw the votes as they were put in, that they were for the sitting member, and in three other cases it was proved that the persons named had stated to the witnesses that they voted for the sitting member. This left nine votes without any evidence for whom they were cast.

The claimant then called three witnesses, — one a deputy-sheriff in Clinton and a resident on the territory now embraced within that town for thirty years, one a trial justice in that town and a resident there for twenty years, and the other a well-known citizen,

all active members of the republican party, and also members of the canvassing committee of that party last fall and for longer or shorter periods before, — to testify as to the party to which those persons belonged. These witnesses stated that they had obtained their knowledge of the reputation of these persons chiefly while performing their duties as members of canvassing committees in different years, but that they had some knowledge of them outside of these duties. Five of the nine persons were naturalized in 1860, and all three of the witnesses testified that they knew four of them, and that they were reputed to be democrats, and two of the three witnesses testified the same in regard to the fifth. One of the remaining four was naturalized in 1866, and two of these witnesses testified the same in regard to him as they had done in relation to the other five, and one of the two said that this person had stated to him that he was a democrat. One of the remaining three was naturalized in 1867, and one only of these three witnesses testified that he knew him, and that he was reputed to be a democrat. The remaining two were naturalized Oct. 26, 1869, and all three of these witnesses testified as to the one, and two of them as to the other, that they knew them, and that they were reputed to be democrats. No evidence was introduced to contradict or control this testimony. The majority of the committee signing this report are of the opinion that this evidence is sufficient to establish the party connection of these persons as being democrats. There was other evidence tending, in the opinion of the majority of the committee signing this report, to show that it was well understood in Clinton that these persons were democrats, but they do not feel that it is necessary to report it, unless the house order all the testimony, so far as taken down, to be reported.

The fact being established that these nine persons casting the illegal votes belonged to the democratic party; and it being proved and admitted that Jonas E. Howe, the sitting member, is a democrat, and well known in the district as such; and that Gilman M. Palmer, the claimant of the seat, is a republican, and well known as such in the district; and that they were opposing candidates at the election; in the absence of any testimony to the contrary, the majority of the committee signing this report are of the opinion that, by parliamentary law, as laid down in said one hundred and ninety-ninth section of Cushing, and explained by the foot note thereto, it is to be presumed that these nine persons voted for the sitting member. This presumption was not denied, at the time, by the counsel for the sitting member, provided party lines were strictly drawn, and evidence was introduced to show

that there were other issues involved in this election, and among others, that of license or prohibition of the sale of intoxicating liquors; and it was proved that a large number of the republicans voted for Mr. Howe; but it was not proved, except in one instance, and this by a man who was not at all clear as to how he did vote, that a single democrat voted for Palmer.

The majority of the committee signing this report, upon this evidence, and the law as they understand it, find that sixteen out of the eighteen illegal votes found to have been cast at the election referred to, were cast for Jonas E. Howe, the sitting member, and that the other two illegal votes, so far as the evidence shows, were cast for Gilman M. Palmer, the claimant for the seat.*

* [NOTE BY THE EDITORS. *Qualified Voter need not disclose for whom he voted.* That a qualified voter cannot be required to testify, directly or indirectly, for whom he voted, is well settled by authority. Ballot voting necessarily implies the right of secrecy on the part of the voter. "This object would be accomplished very imperfectly if the privacy, supposed to be secured, was limited to the moment of depositing the ballot. The spirit of the system requires that the elector should be secured then and at all times thereafter against reproach or animadversion or any other prejudice, on account of having voted according to his own unbiassed judgment; and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage." *Denio*, C. J., in *People* v. *Pease*, 27 N. Y. 81. And see, *People* v. *Cicotte*, 16 Mich. 283; *Reed* v. *Kneass*, 2 Parsons (Phila.), 366; *Respublica* v. *Ray*, 3 Yeates (Penn.), 66; *State* v. *Olin*, 23 Wis. 309; *State* v. *Hilmantel*, Ib. 422; *McCrary Elections*, §§ 194—196.

Nor can others disclose without Voter's consent. "The courts have held that a voter, even in a case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others, who may accidentally, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged, and to allow evidence of its contents, when he has not waived the privilege, is to encourage trickery and fraud, and would, in effect, establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public." *Cooley, Constitutional Limitations*, pp. 763, 764. So, in *People* v. *Cicotte*, *supra*, the court held that evidence for whom a legal voter had voted was incompetent, unless the voter himself had, at the time of voting, made the contents of his ballot public by his own consent. No knowledge obtained without his consent was admissible, and evidence of his statements concerning his vote, whether made before or after casting it, not accompanied by a voluntary exhibition of its contents, was equally inadmissible. The statement by Mr. Cushing (*Law and Practice of Leg. Assemblies*, §199), relied on by the committee, is this: "When the voting is by ballot, a voter is not compellable to disclose the character of his vote or to testify for whom he voted on a given occasion. When it becomes necessary, therefore, on the trial of a controverted election, to show for whom votes by ballot were given, and such a voter refuses to appear, or appearing refuses to disclose for whom he voted, evidence is admissible, of the general reputation of the political character

This will make the vote for representative in the district s as follows: —

Whole number of votes returned for Jonas E. Howe, . . .
Deduct illegal votes cast for him, ...

This leaves the whole number of legal votes cast for Jonas E. Howe, ...

Whole number of votes returned for Gilman M. Palmer, . .
Deduct number of illegal cast for him, ...

Which leaves the whole number of legal votes cast for Gilman M. Palmer, ...

Deduct whole number of legal votes cast for Jonas E. Howe, .

This leaves a plurality for Gilman M. Palmer of . . . .

of the voter, and as to the party to which he belonged at the time of the elect If this is meant to apply to *qualified* voters, the statement is not supporte authority. Mr. Cushing cites, as his authority, a speech of Mr. Jenkins of York in Congress in 1846, upon the New Jersey controverted election *(16 Cong. G App. 455)* in which the position was assumed that their declarations and reput as members of a party, were competent, to show how certain students, claime have been disqualified, had voted. If these students were qualified voters, th dence violated their privilege of secrecy; if not qualified, they were not entitle the privilege. It may be added, however, that very seldom is it necessary to in for whom *qualified* voters voted. The inquiry is important mainly where the were illegal.

Privilege can be waived by Voter. But this privilege of secrecy is purely pers and the voter can, at any time, waive it, and testify for whom he voted, even i party against whom he testifies objects. *Reed* v. *Kneass*, and *cases cited*, s Such evidence from the voter regarding the person voted for is to be distingu from evidence of the voter's intention in the case of an imperfect ballot, referre in the case of *Wright* v. *Hooper*, *ante*. In that class of cases it is held tha voter cannot testify how he intended to vote by a particular ballot cast by him in this case the question is, what ballot did he cast? In other words, the evide offered to establish a fact, not to prove an intention. *Reed* v. *Kneass*, *supra*.

Privilege does not extend to Persons voting illegally. The committee, in the s report, were in error in assuming that voters, found by them to have been unqual were entitled to the privilege of secrecy regarding their votes. This privilege o part of witnesses is strictly confined to those who were legally entitled to vote a election in question, and never extends to those whose votes were illegal. The tection continues, where the voter's right to vote is disputed, until his want of ification is proved; then the immunity ceases, and the contents of the ballot can be proved without his consent. *People* v. *Cicotte*, 16 Mich. 283. So, in v. *Hilmantel*, 23 Wis. 422, the court refused to extend the privilege to a pe who, although a qualified voter, had not been registered as required, so that his was illegal. See *McCrary*, *Elections*, § 297.

Evidence to show how unqualified Voter voted. The person voting illegally, ha no privilege of secrecy as to his vote, cannot refuse to testify for whom he vote the ground of any privilege as a voter. But as illegal voting is a criminal off

The majority of the committee signing this report, for the reasons herein stated, report the accompanying resolve [that Howe was

he is not obliged by his evidence to criminate himself. The privilege of declining to answer on this ground is the personal privilege of every witness, but if he does not claim it, the person against whom he testifies cannot object upon this ground. *State* v. *Olin*, 23 Wis. 310; *Commonwealth* v. *Shaw*, 4 Cush. 594.

Where the unqualified voter is not examined, or refuses to answer, or fails to remember for whom he voted, it is competent to resort to circumstantial evidence to establish the fact. *McCrary, Elections*, § 293. The question is unsettled, whether, to prove the fact, the declarations made, not under oath, by such voter, before or after voting, as to the person for whom he intended to vote, or had voted, are admissible. In the above report, the committee admitted them. But in the *Dresden case*, *Massachusetts Election Cases*, Cushing, S. & J., 201, such declarations were expressly excluded. In the controverted election case, in the 42d Congress, of *Cessna* v. *Myers*, *Smith's Cong. Election Cases*, 60, Mr. Geo. F. Hoar, reporting for the committee, expressed grave doubt as to the admissibility of such declarations; saying:—"Another question of importance, which has arisen in the discussion of the case, is the question whether evidence of the declarations of alleged voters, made not under oath, in the country, should be received to show the fact that they voted, or for whom, or that they were not legally entitled to vote. Some of the committee think that such evidence ought in no case to be admitted; except, of course, so far as declarations, made at the time, of the party's intent or understanding as to his then present residence, or his purpose in a removal, is admissible as part of the *res gestæ*. All of the committee are of opinion that such evidence is to be received with the greatest caution, to be resorted to only when no better is to be had, and only acted on when the declarations are clearly proved and are themselves clear and satisfactory." Mr. McCrary shares this doubt. *McCrary, Elections*, §§ 270-273. *Gilliland* v. *Schuyler*, 9 Kansas, 569. Such declarations were excluded in other cases before Congress. *Newland* v. *Graham*, 1 *Bartlett, Cong. Election Cases*, 5; *New Jersey Case*, *Ib.* 19. But declarations of persons voting, concerning their votes, were held admissible as evidence in *Vallandigham* v. *Campbell*, *Ib.* 223. To the same effect see *State* v. *Olin*, 23 Wis. 310; *State* v. *Hilmantel*, *Ib.* 422; *People* v. *Pease*, 27 N. J. 45; in which cases such declarations were admitted on the ground that such voters are to be regarded in effect as parties to the proceeding, so that their declarations are admissions.

The fact that a person voted can be shown by the check on the voting list. *People* v. *Pease*, *supra*. The fact for whom he voted, after proof of the illegality of the vote, can be proved by persons seeing the ballot deposited, or other evidence as to his acts. Evidence of his party relations and reputation is of more doubtful competency, though perhaps the doubt is applicable more to the *weight* to be given to the evidence, than to its *admissibility*. Judge Cooley says upon this: "A very loose system prevails in the contests over legislative elections, and it has been held that when a voter refuses to disclose for whom he voted, evidence is admissible of the general reputation of the political character of the voter, and as to the party to which he belonged at the time of the election. This is assuming that the voter adheres strictly to party, and always votes the 'straight ticket,' an assumption which may not be a very violent one in the majority of cases, but which is scarcely creditable to the manly independence and self-reliance of any free people; and however strongly disposed legislative bodies may be to act upon it, we are not prepared to see any such rule of evidence adopted by the courts." *Cooley, Constitutional Limitations*, p. 764, note. And the action of the house, in the above case, in substituting the minority report, if based upon the reasons stated in it, that the evidence was insufficient to show how the persons in question had voted, seems to affirm the views of this eminent authority.]

not entitled to the seat, and that the petitioner, having a plurality of the votes, was duly elected and entitled to the seat.

[Mr. Fitzgerald submitted a minority report, finding that the evidence failed to show that the persons found by the majority not to have been legal voters, and to have voted for the sitting member, had so voted, and stating other reasons for confirming the sitting member in his seat. Upon presentation of the report, it was amended by substituting the recommendation of the minority that the petitioner have leave to withdraw, and the sitting member was declared entitled to the seat. H. J., 1870, p. 282. The action of the house was presumably based upon the opinion of the minority member that the evidence was insufficient to prove that the votes found to have been illegal, or enough of them to change the result of the election, were cast for the sitting member. The case, with the accompanying note referring to the authorities upon the question, is published by the editors as of value as a precedent.]

SENATE—1871.

JAMES H. LELAND *v.* FRANCIS W. BIRD.

Hon. STEPHEN H. RHODES, Hon. ADIN THAYER, Hon. ORLANDO B. TENNEY, Hon. RICHARD GOODMAN, and Hon. GEORGE F. RICHARDSON, *Special Committee.*

Senate Document, No. 13. January 13, 1871. Report by Mr. RHODES, *Chairman.*

Rejection of Return for alleged Error refused. The fact that the vote for senator in a town was much less than that for other candidates on the same general ticket, and fourteen less than the number of names checked on the voting list (it being conceded that the vote for governor and lieutenant-governor was erroneously returned), will not, in the absence of evidence connecting the error in the vote for governor and lieutenant-governor with the senatorial vote, warrant the rejection of the return for senator in that town, or the ordering of a new election.

The Special Committee to whom was referred the petition of James H. Leland of Walpole, for a seat in the senate from the third Norfolk senatorial district, having heard all parties interested who desired to be heard, respectfully submit the following report: The petitioner claims that, through mistake or otherwise, the votes cast in the town of Norfolk, at the last general election, were so carelessly and erroneously counted that it is impossible to ascertain the true count thereof; and that for this reason the returns of votes of said town ought to be rejected. As the petitioner had a plurality of the votes given in the remaining towns of the district, he prays to be admitted to a seat in the senate.

It appeared in evidence before the committee, that on the day of election the polls were opened in the town of Norfolk about ten o'clock in the forenoon, and closed between the hours of two and three o'clock in the afternoon; and that the votes were received, sorted and counted by the selectmen, and public declaration made of the result in open town meeting as required by law.

By the marks placed upon the check list used on election day, opposite the names of those who voted, it appeared that one hundred and six persons had cast their ballots, but the returns show that the whole number of votes given for governor, was one hundred and twenty-one, and for lieutenant-governor, one hundred and twenty-three.

For the candidates for other offices, the whole number of ballots cast was as follows, viz. : —

For Secretary of the Commonwealth,	104
Treasurer and Receiver-General,	104
Auditor of Accounts,	104
Attorney-General,	104
Councillor,	104
County Treasurer,	104
Register of Deeds,	104
County Commissioner,	106
Representative in Congress,	99
District-Attorney,	78
For Senator,	92
Of which Francis W. Bird had	41
J. F. Ellis,	26
James H. Leland,	14
J. G. Ray,	11

All the candidates, except those for representatives to the General Court, were voted for upon one ticket, and it was in evidence that the names of some were scratched.

The petitioner contended, upon these facts, that as the returns show an error in the counting of the votes for governor and lieutenant-governor (a greater number having been returned for those officers than there were names checked upon the voting list), and that as the number of ballots for district-attorney, and for senator, appeared to have been considerably less than was cast for the other candidates upon the same general ticket, the selectmen must have included in the count of the votes for the first two officers, ballots which were given for the last two; and that it is impossible, therefore, now to determine how many votes were cast for senator, and for whom they were cast.

If these views of the petitioner are correct, inasmuch as the sitting member was elected by a plurality of only twelve votes, it would undoubtedly be justifiable to recommend the rejection of the returns from this town. The committee, however, while satisfied that there was an error in the record of the number of votes given for governor and lieutenant-governor, has failed to discover any link in the testimony connecting that error with the senatorial vote.

An analysis of the returns shows that only the candidates for county commissioner received the whole number of votes cast, while those for seven other offices had two less, and the candidate for representative in congress seven less than that number.

It is evident, therefore, that only one of the electors exercised

the right of voting for candidates for all the offices, and that while all the rest appeared to appreciate the value of that privilege so far as relates to most of them, many failed to express at the ballot-box their preferences for the prosecuting officer of the county, and for senator.

Upon all the facts, the committee is of opinion that there were no such informalities, irregularities or mistakes in the counting of the votes in the town of Norfolk, at the last election, or in the returns thereof, as would warrant a recommendation that the prayer of the petitioner be granted, or that a new election should be ordered. The committee, therefore, recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. S. J., 1871, p. 30.]

DEXTER S. KING *v.* W. D. PARK.

HON. STEPHEN H. RHODES, Hon. ADIN THAYER, Hon. ORLANDO B. TENNEY, Hon. RICHARD GOODMAN, and Hon. GEORGE F. RICHARDSON, *Special Committee.*

Senate Document, No. 313. May 19, 1871. Majority report by Messrs. RHODES and GOODMAN; minority report by Messrs. THAYER and RICHARDSON; separate report by Mr. TENNEY.

Illegal Ballots. The fact that illegal votes were deposited in a ward, but not counted, and that more votes were cast than there were names checked on the voting list, — the excess, if rejected, being insufficient to change the result, — will not warrant the rejection of the entire ward return, or the avoidance of the election in that ward.

Eligibility of Senator. Inhabitancy in the District. The question of domicile is a question of fact, and the intention is evidence of the fact, but not conclusive; for, to make domicile, both fact and intent must concur.

Same. Residence of Family. The place where a married man's family reside is generally to be deemed his domicile; and if his family reside in one place, and he does business in another, the presumption is that the former place, as a rule, is his domicile.

Same. Evidence. Upon the question whether a senator was at the time of election in 1870, an inhabitant of the district, it *appeared* that he had formerly resided with his family in the district; that in 1865 he moved his family to his house in Hull and remained there eight months, when he sold his house there and removed his family to a house owned by him in Roxbury, where they remained until 1867, when he purchased a house in Melrose and removed his family there, where they remained until June, 1870, when he bought a house in Boston, out of the district, into which he moved his family, and where they continued to reside, and where he

slept once or twice a week; during these years he was proprietor of a hotel in the district, in which he had apartments, kept his clothes and usually slept, his wife occasionally staying there with him; he paid three poll taxes in Melrose under objection that he lived in Boston, did not vote in Melrose, and paid these taxes only because it was cheaper than the cost of getting rid of them; he also paid personal taxes in Boston and always voted there; he testified that he resided and always intended to reside at his hotel; it was *held* by a majority of the committee (three), that he was not an inhabitant of the district at the time of election, — but a minority of the committee (two) *held* that he was an inhabitant, and the minority report was sustained by the senate.

The Committee on Elections, to whom was referred the petition of Dexter S. King, for a seat in the senate now occupied by W. D. Park, having heard the parties interested, and having considered the matter, submit the following report: The petitioner claims his seat on the following grounds: —

First. That the returns of the election from ward 5, — said ward comprising a portion of the senatorial district in question, — should be thrown out, because said election in that ward was void on account of fraud and fraudulent votes cast therein, and other infractions of the laws regulating the manner of voting; and

Second. That at the time of his election the said Park was not an inhabitant of the district for which he was chosen.

It appears from the returns that in ward 4 Mr. King received 540 votes for senator, and Mr. Park 426; scattering, 84. In ward 5 Mr. Park received 782; Mr. King, 303; R. F. Naylor, 38; and that in ward 5, 159 votes were cast in excess of the number of names checked on the check list.

In support of the first allegation, testimony was presented showing conclusively that attempts were made to "stuff" the ballot-box in ward 5; that such attempts were allowed, or not prevented by the inspectors of elections; that it was only through the vigilance of the United States supervisor and the officers of police that such attempts were not successful; that upon their attention being specifically called to the illegal ballots in the boxes, they were taken out by the inspectors, and were put aside and not counted; that there were many other gross violations of law, and attempts to defraud the voters in that ward of their political rights, deserving of the severest reprobation; and that the inspectors of the election were unfaithful to their oaths and to their duties.

But inasmuch as the ballots illegally deposited were not counted, and the 159 votes cast in excess of the number of names checked would not affect the result if thrown out, and the other violations of law are not sufficient, under the reported decisions in contested election cases, to warrant your committee in declaring the election in ward 5 void, or in rejecting the entire return of said ward, your

committee find that on this part of his case the petitioner has not made out his claim to the seat.

Dismissing the subject of fraud, your committee proceed to consider the second point: as to the constitutional qualifications of the sitting senator.

By the Constitution of the State, every senator must be at the time of the election an inhabitant of the district for which he is chosen. And every person shall be considered an "inhabitant" in that town or district where he dwelleth or hath his home.

Mr. Park lived with his family in Central Court, in the 5th ward of the city of Boston, from 1858 until 1865, when he removed his family to his house in Hull, which they occupied about eight months, when he sold that and removed his family to a house owned by him in Roxbury, where they remained until March, 1867, when he purchased a house in Melrose and removed his family there, and they remained there until June, 1870, when he purchased a house in ward 10, in the city of Boston, and removed his family into it, where they have ever since continued to reside, and where he sleeps, sometimes once a week, sometimes two or three times a week, and his wife occasionally goes to his hotel to stay with him. In addition to his real estate tax, Mr. Park paid three poll taxes in Melrose; once in person, when he stated to the collector he ought not to pay it, as he lived in Boston, did not vote in Melrose, and said he paid the poll taxes there as it would cost more money to get rid of them than they amounted to.

Mr. Park stated in his testimony before the committee that he had always made his residence at his hotel in Central Court, except during the year 1868, when he had a lodging-room in Hayward Place, in ward 5, Boston, for seven months, where he stayed nights as his convenience required, and still claimed his residence in said ward, and that during all the time since August 2, 1858, to the present, except during the year 1868, he was the proprietor of, and kept the hotel in Central Court, had his own apartments, consisting of parlor and chamber, there, and kept his clothes there and commonly slept there; that he always gave his name as living at the said hotel, voted in ward 5, was elected from said ward to the common council in 1864 and '65, is taxed in said ward by the United States assessors and city authorities.

Upon the evidence it also appears that Mr. Park purchased and held a season ticket between Melrose and Boston for the six months commencing September, 1868, which he says he got for convenience, as in going out he often found himself without ticket or money. Upon this state of facts was Mr. Park at the time of the election an inhabitant of the third Suffolk district?

We consider the word "inhabitant," mentioned in the original Constitution, and there applied to the citizen voting and the citizen voted for, as meaning the same as "one who has resided," applied to the voter alone, in the third article of the amendments to the Constitution, and both of these expressions, as equivalent to the familiar term domicile, and therefore the right of voting and of being voted for is confined to the place where one has his domicile, his home or place of abode.

The question, what place is any person's domicile, is a question of fact, and in some cases, where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicile but for the circumstance attending the other, the intent of the party to consider the one or the other his domicile will determine it. But the fact and the intent must concur. The general rules on the subject of domicile are, that every person must have a legal domicile somewhere, and can have only one domicile for one purpose at one and the same time. That the place where a married man's family resides is generally to be deemed his domicile. That if a married man has his family fixed in one place, and he does business in another, the former is considered the place of his domicile. (11 Pickering, 415; 5 *Id.*, 311; 23 *Id.*, 170; 7 Gray, 300.)

It is a natural sequence to these rules that a person retains his domicile of origin till he changes it by acquiring another; and so each successive domicile continues until changed by acquiring another. And it is equally obvious that the acquisition of a new domicile does at the same instant terminate the preceding one.

The domicile of Mr. Park, up to the time when he removed his family therefrom, was in Central Court. There is no evidence that when he broke up his domestic establishment there and removed his family to Melrose, he intended to return there with them. On the contrary, the presumption is strong that he intended to abandon his domicile there, and that when he returned to Central Court, leaving his family elsewhere, such return was merely for the purposes of business; and a residence *negotiorum ratione*, for the purposes of business and acquisition of property is a circumstance of little weight, and by no means sufficient to constitute a domicile, when counteracted by more controlling circumstances. In a case depending upon minute and complicated circumstances, the mere declaration of a party, made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale. In nearly all the cases which have come under the consideration of your committee, where such intent has had weight, the parties have been single, and the ques-

tion of a residence apart from the family has not been in view. When Mr. Park removed his family to Melrose, all the outward *indicia* of inhabitancy pointed to that as his place of residence; and when he again removed them to their present home in the 10th ward, the same *indicia* pursued it, and the declaration of intent is not aided by the facts. The *factum* and the *animus* do not concur. In the cases where a person has two dwelling-houses in different towns, in each of which he lives with his family an equal portion of the year (*Harvard College* v. *Gore*, 5 Pick. 310), and where a citizen leaves the country to be absent abroad for purposes of business or pleasure for an indefinite period, still retaining his house and furniture in the place of his previous residence (*Sears* v. *Boston*, 1 Met. 250), declaration of intent may have an important bearing. The case of Holman, page 64, which comes the nearest of any to the one under our consideration, turned expressly upon the point, that the removal of his family was only for a summer residence, and there were no circumstances showing that the domicile in Boston had ever been abandoned, or of any intention of remaining out of the city except for the summer; and though the removal of the family from the city before the first of May raised a strong presumption of a change of habitancy, yet the presumption was properly allowed to be rebutted by evidence of the intention of the party, and the facts as proved concurred with the intent.

Impressed with these views of the law and the circumstances of this case, your committee feel compelled to come to the conclusion that W. D. Park is not entitled to the seat in the senate now occupied by him, for the reason that at the time of his election he was not an inhabitant of the third Suffolk district, for which he was chosen, but was an inhabitant and resided with his family in the 10th ward of said city.

Messrs. Richardson and Thayer submitted the following minority report: —

We concur with our associates in so much of their report, as relates to the frauds and fraudulent voting in ward 5, in Boston, at the last State election, but dissent from the conclusions to which they have arrived in regard to the domicile of Mr. Park.

We respectfully submit some of the reasons which have led us to a different result from that reached by a majority of the committee.

In considering the question of residence in this case, it is of the highest consequence to ascertain what the *intention* of Mr. Park was in this respect, because in determining the domicile of a party,

all the authorities upon the subject in this Commonwealth, as well as in other States, concur in attaching great weight to the *intent* of the person himself. In *Harvard College* v. *Gore*, 5 Pick. 374, Parker, C. J., says: "It seems manifest from all the cases on domicile that *intention* enters essentially into the subject." In *Fitchburg* v. *Winchendon*, 4 Cush. 194, Fletcher, J., says: "The *intention* is a most essential element in the case, and is a most 'material fact.'"

In *Fiske* v. *The Inhabitants of Chester*, 8 Gray, 508, the court declares: "That a man may determine where his home shall be, and thus incidentally determine where he shall be taxed."

In *Lyman* v. *Fiske*, 17 Pick. 234, Shaw, C. J. says: "The mere declaration of the party, made in good faith, of his election to make one place rather than another his home, would be sufficient to turn the scale."

In 5 Met. 585, the judges lay this down as a rule: "In some cases where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicile, but for the circumstances attending the other, the *intent* of the party to consider the one or the other his domicile will determine it." See also *Lyman* v. *Fiske*, 17 Pick. 231.

We believe that the facts which appeared in evidence left no doubt in the mind of any member of the committee, that the intention of Mr. Park was to make his domicile in ward 5, from the day when he first went there to reside, in 1858, up to the present time. Such being the case, and *intent alone* not being sufficient to settle the place of domicile, it remains only to consider whether the acts and conduct of Mr. Park were consistent with such intent.

It is undisputed that Mr. Park, for many years prior and up to 1865, had a legal residence in ward 5, in the city of Boston, and that legal residence now continues, unless it is made to appear that since that time he has gained one elsewhere.

In the year 1865 the family of Mr. Park resided for about eight months in Hull, after that, for about a year in Roxbury; he then moved his family to Melrose, where they resided till June, 1870; from there they went to a house in ward 10, in the city of Boston, where they now live.

It is not claimed, we believe, that his residence was ever established either in Hull or Roxbury, but the difficulty seems to arise out of the fact that for some considerable time his family dwelt in Melrose. It must be admitted, as stated by our associates in their report, "that where a married man's family reside is *generally* to be deemed his domicile;" but this is only the enunciation of a general

principle, applicable to those cases where there is no evidence of intent accompanied by acts and conduct on the part of the husband, to make his domicile elsewhere, and must not mislead us into the belief that the place of residence of the family is to fix that of a party himself. Chief Justice Shaw declares in *McDaniel* v. *King*, 5 Cush. 469, that "the wife's domicile may be governed by that of the husband, but the reverse is not true;" and there are several cases in our own reports where it appeared that the family was in one place and the husband in another, and yet it was held that the latter's residence was where he himself lived, and not where he had left his family.

This principle was settled in the case of *Fitchburg* v. *Winchendon*, 4 Cush. 190. There one Lemuel Sanders, for several years prior to 1831, lived in Oakham with his wife and four children; in June of that year he went to work in Winchendon; and there was evidence tending to show that he went there with the *intention* of making that his residence. His family remained in Oakham till the 6th of November, 1832, he occasionally visiting them, when he moved them to Winchendon. It was held that upon these facts the jury were justified in fixing his place of residence in the latter town, from the day when he went there to work. See also *Cambridge* v. *Charlestown*, 13 Mass. 501; *Greene* v. *Greene*, 11 Pick. 415.

Since the husband is the head of the family, and they acquire their residence through him, and not he through them, and since the intent of Mr. Park is admitted, it is proper that we should apply the rules of law to the facts in this case.

In the first place, Mr. Park never intended to make Melrose his home; on the contrary, he always claimed a residence in ward 5. When asked to vote in Melrose he declined to do so, saying he was not a citizen of that town, but lived in Boston. One of the poll taxes assessed to him in Melrose he paid under protest, and the other with the remark that he paid it because it would cost him ten dollars to get rid of paying two. For the past ten years he has been taxed and paid a poll, personal property, and United States tax in ward 5 in Boston, and always voted there, and has been a member of the common council of that city. During all the time when his family was in Melrose, with the exception of the time when he had rooms in Hayward Place, in the same ward, he kept a hotel in Central Court, had a room and parlor there for his own use, *usually slept there*, and there kept all his clothing, and declared that place as his residence. In January, 1868, he sold his hotel business, and purchased it back in January, 1869; during this time he occupied rooms in Hayward Place, substantially as he did, his rooms at the hotel. After his family went to ward 10, he still con-

tinued in the occupancy of his rooms at the hotel. He occasionally visited his family at Melrose, — sometimes once a week and sometimes oftener, as suited his convenience. During six months of the time, he had a season ticket upon the railroad to Melrose, but it did not appear that his visits were more frequent than they had been before, or were afterwards. It is certain then, that he himself resided most of the time in ward 5, and it is equally certain that he intended to make his home there.

Our associates in their report lay down this principle of law, that in determining the place of domicile "the *fact* and *intent* must concur;" that is, the *fact* of residence and the *intention* to make it such must correspond. We are satisfied with that rule, and are willing to test the present case by it. Mr. Park's *intent* was to reside in ward 5 in Boston; he did reside there a larger portion of the time that his family were in Melrose; certainly the *intent* and the *fact* do not here concur, and therefore, Mr. Park did not acquire a residence in that town. Since "a person retains his domicile of origin till he changes it by acquiring another," Mr. Park has "retained his domicile of origin" in ward 5, and has never lost it. On the other hand, applying this rule to the facts as we view them, Mr. Park's *intent* was to make his residence in ward 5, for the greater portion of the time during which he did reside there; the *fact* and *intent* concur in fixing that as his legal residence, and we are of opinion that he was a citizen of ward 5, in the third Suffolk senatorial district, at the time of the election, and is entitled to retain his seat. We therefore recommend that the petitioner have leave to withdraw.

[Mr. Tenney concurred in the report of the committee on the question of domicile, but was of opinion that by reason of the frauds and fraudulent voting, and general neglect of duty and irregularities on the part of the inspectors in ward 5, the returns from that ward should have been rejected, and Mr. King declared to have been elected. Messrs. Richardson and Thayer, as appears in their minority report, concurred with Messrs. Rhodes and Goodman on the question of fraud and fraudulent voting in ward 5, but differed upon the question of Mr. Park's domicile. The senate adopted the report of Messrs. Richardson and Thayer, that the petitioner have leave to withdraw, by a vote of 18 yeas to 7 nays. S. J., 1871, pp. 406, 407. Subsequently a motion to reconsider was rejected by a vote of 4 yeas to 22 nays. The editors publish both reports as valuable upon the question of the domicile of the sitting senator.]

HOUSE—COMMITTEE ON ELECTIONS, 1871.

Messrs. FREDERICK A. BOOMER of Fall River, ARTHUR G. BISCOE of Westborough, JAMES S. ALLEN of East Bridgewater, DANIEL N. BARRETT of Lynn, SYLVESTER F. ROOT of Greenwich, ALBERT LEIGHTON of Pepperell and H. D. SISSON of New Marlborough.

JOHN P. ORDWAY ET AL. *v.* CHARLES LEVI WOODBURY ET AL.

House Document, No. 136. February 28, 1871. Report by Messrs. BARRETT, ROOT, LEIGHTON and SISSON,—Messrs. BOOMER, BISCOE and ALLEN, dissenting.

Effect of illegal Votes. Where a vote is proved to have been illegal, unless such vote would affect the result of the election, it is unnecessary to inquire for whom it was cast.

Evidence. Burden of proving illegality of Votes is upon Contestant. Where certain names on the voting list are marked with a sign that the persons whose names are so marked have not paid the required tax, under instructions to the ward officers not to refuse the vote of any person whose name is so marked, but to challenge it, and if, after such notice, the voter insists upon voting at his peril, to receive the vote, the burden of proof is upon the person contesting the legality of such vote, when so received, to prove that such voter has not paid the required tax.

Effect of excess of Votes over number checked on List. The mere fact that 159 more votes were returned than there were names checked on the voting list, if there are no circumstances corroborative of any presumption of fraud, and the causes which produced the discrepancy did not affect the result, will not invalidate the election.

The Committee on Elections, to whom was referred the petition of John P. Ordway of Boston, and Edward F. Maynard, also of said Boston, praying to be allowed seats in the house as members from the fifth Suffolk district, or that the election of Charles Levi Woodbury, John J. Murphy and John W. Regan may be declared void; and also the petition of Charles G. Nazro of Boston, praying that the election of said Woodbury, Murphy and Regan may be declared null and void, and that they may be declared as not entitled to their seats, having heard the petitioners and said Woodbury, Regan and Murphy, and having considered the matter, a majority of the committee submit the following report: The election of Charles Levi Woodbury, John J. Murphy and John W. Regan, the sitting members of the house from the

fifth Suffolk district, is controverted by the petitioners on the following grounds, as set forth in their petitions and in the specifications submitted by them to the committee:—

First. The election was void because of fraud and fraudulent votes cast by sundry persons, and allowed by the inspectors and officers of election.

Second. That some two hundred and more votes were returned as cast, above and beyond what were actually cast and checked upon the voting lists.

Third. That large amounts of ballots were fraudulently put into the boxes, and either known to, or not prevented by the inspectors, when they were bound to see and know of it, and to prevent it, the same being in packages or bundles containing a large number of distinct votes for the same officers.

Fourth. That the officers and inspectors of the election, after ballots had been cast and put in the boxes, took out large numbers and tore them up, not counting them.

Fifth. That some person, not J. W. White, and known to the inspectors not to be he, voted, and was allowed to vote, upon the name of said White, when he was not a legal voter, and himself not entitled to vote.

Sixth. That there was ballot-stuffing and fraudulent voting generally, in various ways and manners, and by various persons, whose names are unknown to the petitioners; that ballots were put in in packages and bundles, folded up and containing many distinct votes, and not open and separate as required by law; that persons put their hands deep into the boxes, and deposited votes from their sleeve into the box; that persons came up and voted different times as repeaters, when their names had once been checked on the voting list; that persons whom the inspectors knew had not paid their taxes, were allowed to vote.

Seventh. That the ballots were not correctly and properly counted and returned by the officers; that all ballots cast were not kept and returned to the city clerk, according to law.

Eighth. That by a proper count and return of votes cast, Dr. J. P. Ordway, at least would have appeared elected, and not John W. Regan.

Ninth. That a constable not authorized by law, was required and allowed to join in the counting of ballots.

Tenth. That several of the inspectors left their places at the voting lists, during the day, at different times, leaving the voting lists in charge of only two or three of their number.

In support of the first, third and sixth allegations, the petitioners introduced evidence tending to show that a number of votes were cast in packages or bundles; that persons were allowed to vote whose names had already been checked; and that persons whose names bore the tax collectors' cipher, indicating that their taxes were unpaid, were allowed to vote. Under these allegations, the committee find, from the evidence, that two persons were detected in the act of casting, each, a package of votes. One of these persons was seen by Daniel H. Shirly to empty a package from his sleeve, under the cover of an open ballot. The other package was cast by a person who voted upon the name of John W. White, and was seen to vote by three police officers, all of whom heard the package drop into the box, and one of whom, standing behind the voter, saw a package in his hand. Henry Fall, the inspector at whose box this affair occurred, testified that the voter cast an open ballot, and that he heard something drop as the vote was deposited. Immediately Sergeant Gould, one of the police officers whose attention was attracted by the falling of the package, informed United States Supervisor Spaulding of the fact, and that officer, after consultation with the inspector, withdrew the package from the box and retained it in his possession.

The committee find, from the testimony of John W. White upon whose name these votes were cast, that said White, although he had paid a tax for the year 1870, was not entitled to vote, he being an alien. So that whether White himself, or a person personating White, deposited the package referred to, both the package and the open ballot accompanying it were clearly illegal; and, as the package only was removed from the box, it would appear that a fraudulent vote was received and counted. But as such vote would not affect the result of the election, the committee will not consider the probabilities as for whom it was cast.

The committee find, also, that five or six persons, whose names had been previously checked, were allowed to vote, upon taking an oath, administered by the warden, to the effect that they had not previously voted during the day. There are no means of ascertaining whether the names of these persons had been checked through mistake, or had been voted upon by parties personating the legal voters whom such names represented; but the committee incline to the opinion, in the absence of a shadow of proof to the contrary, that the most reasonable and probable solution of the matter is, that the checks set against these names were intended, by the officer who made them, for other names, upon which the proper person had voted.

The committee further find that, in a very few instances, persons were allowed to vote, whose names on the check lists bore the tax collectors' cipher, as an indication that their taxes were unpaid.

As a guide to the ward officers as to the course to be pursued when persons whose names bear this cipher apply to vote, the following printed instructions are sent them, viz.: "If a voter's name upon the list be checked (with two dots), as a sign that he has not paid his taxes, his vote CANNOT be REFUSED by the inspector having charge of said list. Upon his offer to vote, the inspector will CHALLENGE his vote; and if, after such notice, he still persist in offering his vote, it must be received, but the PERIL of being judged an ILLEGAL voter falls upon the party interested." From these instructions it would appear that the authorities who apply this cipher are themselves so much in doubt as to whether the persons against whose name it appears have or have not paid a tax within the prescribed time, that they deem it their duty to instruct the election officers that they cannot refuse the votes of such persons upon the assumption that they have not paid their tax.

Therefore, as the names of these persons appear on the list of legal voters, and as these instructions show that the official who affixes this cipher says, subsequently, that this cipher is not to be considered as proof that the person against whose name it appears has not, previous to offering his vote, paid his tax, the committee are of opinion that the burden of proof lies upon the petitioners to show that such voters had not, in fact, paid a tax assessed upon them within two years next preceding the election.

In support of the second allegation, the petitioners produced the check lists used at the election, and also the votes cast on that occasion. And it appeared from the testimony of S. F. McCleary, the city clerk of Boston, that at the last State election the polls were opened in that city, for the reception of votes for the "State ticket," at 8 o'clock A. M., and that they were closed at 4½ o'clock P. M.; and that the polls for the reception of votes on the "Park Act," were opened at 9 o'clock A. M., and closed at 6 o'clock, P. M. Also, that the inspectors were instructed that the check-mark to be employed to distinguish those who voted the "State ticket" should be a dash, and that the check-mark used to distinguish those who voted on the "Park Act" should be a circle. They were further instructed that persons who voted between 8 and 9 o'clock (the time between the opening of the polls for the "State ticket" and those for the "Park Act"), should be allowed to vote

again during the day for the "Park Act." From the testimony of the inspectors, the committee find that three of those officers, acting, it is supposed, under a misapprehension of the instructions directing the method of checking, reversed the order in which the check-marks were to be applied, thus rendering it impossible to determine the exact number of checks used to distinguish those who voted the "State ticket;" but, for reasons given in the following paragraph, they are of opinion that the number of names checked to designate those who voted that ticket, must approximate very closely to the whole number of names checked on the lists.

All votes cast between 8 and 9 o'clock, were given in for the "State ticket," and during that time three of the inspectors checked with a circle and two with a dash. Between 9 and 4½ o'clock, a circle with a dash running through it was the check used by all the inspectors. Between 4½ and 6 o'clock but few votes were received and none but such as were given in on the "Park Act;" and as some of these votes certainly, and perhaps all of them, were cast by persons who had voted the "State ticket" previous to the opening of the polls for the reception of votes on the Park Act, it is obvious that but very few, if any, names were checked after 4½ o'clock, that had not previously received one of the checks employed on that day.

After weighing all the testimony bearing upon the manner of checking, and carefully examining the check lists, and counting the votes returned, the committee are of opinion that the number of votes cast in excess of the number of names checked cannot be far from one hundred and fifty-nine. The ward officers, with one exception, present no theory by which to account for this large discrepancy. One of the inspectors testified that in his opinion the lists were tampered with at the clerk's office at the city hall. But while it appears that there was undoubtedly ample opportunity for the erasure of checks from these lists previous to the city clerk's being notified by the petitioners of their intention to controvert the election of the sitting members from ward 5, there is no evidence tending to show that a single check was erased.

Members of the committee have heretofore had considerable experience in ascertaining the correctness and reliability of check lists, and since the hearing closed have pursued the investigation, only to be confirmed in the opinion long entertained, that, however desirable or necessary it may be that the check lists used at an election should constitute an accurate and complete record of the number of votes cast at such election, and the names of persons by whom cast, it is a fact well known to all who have had much

experience in comparing the number of names checked with the number of votes returned at elections presided over by ward officers, that such lists are wholly unreliable and untrustworthy, as a means of ascertaining the number of legal votes cast, and that the discrepancy between checks and returns will vary, to conform to the degree of intelligence possessed by the election officers and their adaptability to the duties assigned them.

From the return of votes given in for governor at the last state election, we find that something rising 52 per cent. of the legal voters of Boston participated in that election. And we find the percentage of the voters of the several wards, who participated in that election, to range as follows, viz. :—ward 4, 40 per cent. ; ward 8, 44 ; ward 1, 45 ; ward 3, 48 ; ward 12, 48 ; ward 16, 50 ; wards 6, 7 and 9, 52 each ; wards 10 and 11, 53 each ; ward 14, 58 ; ward 5, 59 ; wards 13 and 16, 62 each ; ward 2, 67. There is nothing in this showing that would give rise to a suspicion that the percentage of ward 5 is swollen by fraudulent votes ; nothing that would suggest that the vote of the ward should be reduced 8 to 12 per cent. to make it conform to the check list.

Holding the opinion already expressed, in relation to the unreliability of the check list, and finding no circumstances corroborative of the presumption of fraud, the committee are constrained to believe that the discrepancy shown to exist in this case, is the natural and inevitable result of an attempt, by inexperienced and very incompetent officers, to perform the double and difficult duty of receiving votes and checking the names of persons voting, in the hurry and excitement of a warmly contested election, and that the causes which produced this discrepancy did not produce or affect the result of the election.

In support of the fourth allegation, the committee find, from the testimony of the ward officers, and from that of the constable in attendance upon them, that five or six packages, more or less, containing from three to six votes each, were found among the votes taken from the ballot-boxes to be sorted and counted, and that the warden, after consultation with other ward officers, and with the constable previously mentioned, declared them to have been fraudulently cast, and threw them out, not counting them. It appears from the testimony that nobody examined these packages to ascertain for whom they were cast, but that they bore such unmistakable evidence of having been fraudulently and surreptitiously cast, that the U. S. supervisor, who, with others, is controverting this election, and the constable referred to, both of whom are politically opposed to the warden, testified that, in their

opinion, all the votes thrown out were fraudulently cast and should not have been counted. In regard to the question as to whether all the votes in these packages were fraudulently cast, there was not the least conflict of testimony, and the committee, upon this testimony, are convinced that they were so cast. As to whether one vote in each package should have been considered a legal vote, and counted as such, it appears to the committee that, as each of the two packages which were detected in being cast, was accompanied by an open ballot, which must have been counted, and as it would seem improbable that these packages could have been deposited in the presence of the supervisor, nine police officers, and others, who were guarding the polls, unless each had been screened in a similar way, every vote in each package should have been rejected. But if it were clear that one ballot in each package should have been counted, the validity of the election would not be impaired by their rejection, inasmuch as they are insufficient in numbers to change the result of the election. (See case of town of *Shrewsbury* in 1832, *Chester* in 1852, and *Hopkinton* in 1852.) The petitioners claim, in the seventh and eighth allegations, that the ballots were not correctly counted and returned, and that a proper count and return would show John P. Ordway to be elected, and not John W. Regan.

The committee, having examined the returns of the ward officers, and of the board of aldermen, and counted all the votes cast, submit the following statement: —

	Ward Count.	Board of Aldermen's Count.	Committee's Count.
Charles Levi Woodbury, . . .	554	569	569
John J. Murphy, ...	520	527	528
John W. Regan, ...	471	457	460
John P. Ordway, ...	426	448	448
Chas. G. Nazro, ...	326	324	331
Edward F. Maynard, ...	332	315	319
John M. Maguire, ...	283	240	250
John J. Quinlan, ...	187	121	125
John Donnelly, ...	56	57	63
All others, ...	–	9	9

From which it appears that, although the number of votes given for the several candidates was in no instance correctly returned by the ward officers, the persons returned by them as having been elected, were actually elected.

In support of the ninth allegation, it appears from the evidence of the constable in attendance upon the warden, that he, unsolicited, participated to some extent in the assorting of votes.

In the judgment of the majority signing this report, the petitioners have failed to show that a single illegal vote was received and counted for the sitting members, or that a legal vote cast for the petitioners, or either of them, was rejected, or that the election of the sitting members from ward 5 was not a fair and legal expression of the will of their constituents, and therefore they recommend that the petitioners have leave to withdraw.

[The views of Messrs. Boomer and Biscoe, finding, upon the evidence, that the election should be declared void, were reported by them, and Mr. Allen also submitted a separate report to the same effect. Upon the presentation of the reports, the substitute reported by the minority, declaring the seats of the sitting members vacant, was rejected, by a vote of 33 yeas to 101 nays, and the report of the majority was accepted. H. J., 1871, p. 203.]

SENATE—1872.

AUGUSTUS G. STIMSON *v.* ALONZO W. BOARDMAN.

HON. DANIEL E. SAFFORD, HON. WILLIAM H. LEARNARD, JR., HON. GEORGE F. RICHARDSON, HON. SAMUEL M. GRIGGS, and HON. WILLIAM L. SMITH, *Special Committee.*

Senate Document, No. 123. March 6, 1872. Report by all the Committee.

Evidence. Copies of Voting-list rejected as Evidence. Where the petitioner claimed that persons were allowed to vote upon the names of other voters, and supported his claim by the evidence of a number of persons, that they had not voted at the election, copies of the voting-list, made by the clerks of the petitioner, cannot be received for the purpose of showing that the names of such persons were checked as having voted, although the checks on the original voting-list, used at the election, had been erased for the purpose of using the list at the subsequent municipal election.

Fraud and Irregularities. Result must have been affected to avoid Election. The fact that there were repeating and fraudulent voting, and irregularities, and neglect of duty on the part of the ward officers, in a ward forming part of the senatorial district, will not justify declaring the seat of the returned senator vacant, in the absence of proof that such fraud or irregularity affected the result of the election.

LINUS M. CHILD *for petitioner.*

The special committee, to whom was committed the petition of Augustus G. Stimson, claiming the seat in the senate now occupied by Hon. A. W. Boardman, have duly considered said petition and report:

The petitioner did not press his claim to the seat of Mr. Boardman in the senate, but claimed that the election in that senatorial district should be declared void, and the seat vacant, for the reason that, in ward 2, a part of the district, at the election, there were such irregularities, illegal practice, and frauds in voting, committed so frequently and flagrantly, with the knowledge and connivance of the officers presiding at the polls, that the returns are entitled to no confidence and should be thrown out. To sustain this, the petitioner produced seventy witnesses, who, with the exception of five or six, testified that they did *not* vote at the State election; he then intending to go farther, and show, by inspection of the check lists, that the names of these witneses were checked as having voted; but after the hearing was commenced, it appeared,

by the testimony of the city clerk, that the checks made at
State election had been erased, so that the same lists could be u
at the municipal election in December. To supply this deficien
Mr. Stimson offered copies of the lists made by his clerks, desir
the committee to receive such copies as evidence of the same fo
and credit as the originals; but as the committee did not thi
proper to do this, the entire evidence of these witnesses was val
less.*

The remaining testimony was substantially as follows: T
city clerk testified that nearly every name in the lists, from w
2, under certain letters, C and D, was checked, a circumsta
so remarkable that he called the attention of persons in the off
to it. Horace Houghton testified that he saw a man, about no
throw a handful of ballots, jammed up, into the box; that
remonstrated, and the voter replied that he voted all right,—vo
the democratic ticket; that, upon appealing to the inspector
notice this irregularity, the inspector said that he knew the m
and that he would do all right, otherwise he should not h
allowed him to vote in that way. Upon cross-examination, H
Houghton could not say positively, that the party threw more th
one vote, though it seemed so to him. Another witness, J
McShane, saw a person cast two ballots,—one at half-past
o'clock, and one at half-past two,—who said that he was not a vot
and that he intended to have voted the third time, but was afr
that he should be detected by the inspectors. A voter in the w
testified that, on coming to the polls, he found that his name h
been voted on and was checked. The warden testified that,
three instances, two ballots were thrown together. This fraud w
very impartially distributed between the parties; in one instance
double vote being republican, in one, labor reform, and anot
democratic. In another instance a package of twenty-four rep
lican tickets, folded and compactly pressed together, was tak
from the box. All these ballots were thrown out.

It was pressed upon the committee, as a fact of considera
significance, that there was a very great disparity between the v
in this ward, as it appeared from the returns made by the w
officers to the chief of police, as cast between 2 and 4½ o'clo
and the number of persons voting during that interval. The v

* [NOTE BY THE EDITORS. It has been held that, for the purpose of showing
a person voted, the voting-list is admissible in evidence, though not signed by
inspectors or clerks, having no heading to denote its character, and never ha
been filed in the clerk's office. *People* v. *Pease*, 27 N. Y. 45. Mr. *McCrary* a
"But it would, of course, be necessary to prove, by evidence *aliunde*, that suc
paper was the poll-list which was actually kept by the officers of the election, s
it would not prove itself." (Law of Elections, § 292.)]

for governor, as reported, stood, at 2 o'clock, 717; at 4½ o'clock, 1,542; from which the inference would be, that 835 ballots had been thrown between those hours; whereas, the evidence proved that the vote after 2 o'clock was quite light, compared with the vote between 12 o'clock and 2 o'clock. Mr. C. C. Drew was present at the polls, and thought that the majority of votes were cast between 12 and 2; two or three times as many as between 2 and 4½. Mr. Hemenway testified, that while he was at the polls, in the afternoon, the vote was not very heavy. Mr. Curtis was present at the ward-room during most of the day, and testified that the voting between 12 and 2 o'clock was very rapid, but after 2 o'clock the voting was very light, for the ward; that the number of votes cast could not have exceeded 300. In explanation of this discrepancy, Mr. Geo. W. Close, one of the inspectors, testified that at 2 o'clock there were 250 split tickets that had not been counted, and the entire vote cast between 1 and 2 o'clock was still remaining in the boxes uncounted, so that the vote reported at 2 o'clock did not represent the number of votes cast up to that hour.

Although, upon this testimony, the committee were satisfied that there were irregularities, and neglect of duty on the part of the officers having charge of the polls, in ward 2, they are not of the opinion that the illegal conduct and fraud, charged by the petitioner were so proved that they would be justified in finding that Mr. Boardman is not entitled to his seat. They therefore report that the petitioner have leave to withdraw.

[The report of the committee was accepted. S. J. 1872, p. 193.]

HOUSE—COMMITTEE ON ELECTIONS, 1872.

Messrs. ANDREW J. BAILEY, of Charlestown EDWARD L. BIGELOW of Marlborough, HENRY JONES of Stoughton, WILLIAM H. ALDRICH of Mendon, WILLIAM A. ADAMS of Waltham, THOMAS M. CARTER of Williamsburg, and ALBERT G. SINCLAIR of Winchendon.

T. PRESTON BURT *v.* WILLIAM BABBITT.

House Document, No. 13. January 20, 1872. Report by all the committee, except Mr. ALDRICH.

Recount of Votes refused. General Rule on Recount. In the absence of any proofs or evidence of fraud in the acts of the election officers, or of illegality in the manner of calling, holding, or conducting the meeting at which the election is held, or in the manner of ascertaining the result, unless the petitioner shows a reasonable ground for supposing an error in the count, as made and returned by the election officers, other than the mere fact of there being but a few votes between the number cast for the contestant and the sitting member, the votes will not be recounted.

WILLIAM H. FOX *for petitioner.*
CHESTER I. REED *for sitting member.*

The Committee on Elections, to whom was referred the petition of T. Preston Burt of Berkley, contestant for the seat now held by William Babbitt of Berkley, as representative from the fifth Bristol district, report that it appears from evidence before the committee, that the vote in the towns of Berkley, Dighton, Seekonk and Rehoboth, composing the district, was as follows: —

In Berkley, whole number of votes for Babbitt,					97;	Burt,	70.
Dighton,	"	"	"	"	42;	"	106.
Rehoboth,	"	"	"	"	64;	"	67.
Seekonk,	"	"	"	"	58;	"	14.
Making a total for William Babbitt, of					261;	for T.P. Burt,	257.

Thus showing that, by this count, as made and returned by the selectmen of the several towns, William Babbitt was elected by a plurality of four votes over T. Preston Burt.

The contestant based his claim on two grounds: —

1st. "That the count, as returned from the several towns, was erroneous."

2d. "That votes were cast, in the town of Berkley, for William Babbitt by" three persons not qualified to vote, "and their votes were counted and returned as legal votes."

The second claim was subsequently abandoned by the contestant, and he rested his contest on the ground that the count, as made and returned by the selectmen of the several towns, was erroneous.

The committee have been led to their decision in this case by one general rule, which they have adopted, and which they now ask the house to endorse, and thus furnish a precedent, not only for the present committee, but for future committees.

The rule is this: That, in the absence of any proof or evidence of fraud in the acts of the selectmen, or of illegality in the manner of calling, holding, or conducting the meeting at which the election is held, or in the manner of ascertaining the election of representative, unless the petitioner shows a reasonable ground for supposing an error in the count, as made and returned by the selectmen, other than the mere fact of there being but a few votes between the number of votes thrown for the contestant and the sitting member, the committee will not recount the ballots that may have been preserved.

No other evidence, therefore, having been offered before your committee, in support of the petitioner's claim, other than the fact that there is but four votes difference in the number of votes cast for William Babbit, the sitting member, and the contestant, the committee report that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1872, p. 52.]

WILLIAM M. HARDING *et als.*, *Petitioners.*

House Document, No. 15. January 23, 1872. Report by ANDREW J. BAILEY, *Chairman.*

Irregularity. Failure to deliver Voting List at Time required. Where the town of Maynard was incorporated, out of certain territory in the towns of Stow and Sudbury, under an act providing that the town, for the purpose of electing representatives, should, for a certain time, remain part of said latter towns, and that the selectmen of Maynard should make a list of voters, and post it in Maynard, and, after correcting it, as required by law, should deliver the list of the voters, qualified to vote in either of said towns, to the selectmen of such town, seven days, at least, before the election, failure on the part of such selectmen, so to deliver such list, until the day before the election, although such neglect caused a rumor to become current in Maynard, that none of its inhabitants would be allowed to vote in Sudbury, resulting in the omission, on the part of several voters, to go to Sudbury to vote, other inhabitants, however, going there and voting, will not invalidate the election.

The Committee on Elections, to whom was referred the petitio William M. Harding and others, inhabitants of the town of M nard, praying that the seat of the member from the nineteenth M dlesex district be declared vacant, report: That by chapter 1 of the Acts of 1871, certain territory of the towns of Stow and S bury was incorporated into the town of Maynard; section 6 which act is as follows: —

SECT. 6. The town of Maynard, for the purpose of electing repre tatives to the general court, until the next decennial census, or u another apportionment be made, shall remain a part of said town Stow and Sudbury, and vote therefor at such places as said town Stow and Sudbury shall vote; and the selectmen of Maynard shall m a true list of all persons within their town qualified to vote at ev such election, and shall post up the same in said town of Maynard, shall correct the same as required by law, and shall deliver a true lis all such voters as are entitled to vote in said towns of Stow and Sudb respectively, to the selectmen thereof, seven days at least before election, to be used thereat.

It was claimed by the petitioners, and it appeared before committee, that this section was not strictly complied with by selectmen of Maynard, inasmuch as they delivered the list p vided for by said section to the selectmen of Sudbury only one before the election.

It was also claimed by the petitioners, and it appeared to committee, that by this neglect a rumor became current in Mayn that the inhabitants of this town would not be allowed to vote Sudbury, and that on this account several voters neglected to g the place of meeting and vote. No claim is made that any of petitioners tried to vote.

Your committee are of the opinion that this neglect of selectmen of Maynard did not, in itself, deprive any person his vote, and it appeared in evidence that eight of the inhabita of Maynard did vote in Sudbury.

Therefore, inasmuch as the selectmen of Maynard were the o officers guilty of any neglect, and as this neglect gave rise to rumor that deterred the petitioners from trying to vote, your c mittee are of the opinion that the inhabitants of Maynard, if grieved, should be required to seek their redress in punishing selectmen for their neglect, and in electing selectmen who will more careful to attend to the duties imposed upon them.

They accordingly recommend that the petitioners have leave withdraw

[The report of the committee was accepted. H. J., 1872, p. 8

GEORGE E. DAVIS *v.* PATRICK MURPHY.

House Document, No. 69. February 14, 1872. Report by Messrs. BIGELOW, SINCLAIR, JONES and ADAMS, — Messrs. BAILEY, CARTER and ALDRICH dissenting.

Recount by Aldermen, where Ballots were not properly returned. Where the ballots cast at an election, in certain wards in a city, were not transmitted to the city clerk, by the constable in attendance at the election, nor by one of the ward officers, other than the ward clerk, and the ward clerk did not retain custody of the seal, as required by Acts of the year 1863, chap. 144, § 2 (Pub. Stats., chap. 7, § 28), but the ballots were returned by the clerks of the wards, or other unauthorized persons, and the ward seals were returned, with the ballots, to the city clerk, although there was no evidence of fraud, or tampering with the ballots, it was *held*, that such failure to comply with the statute regarding the return and preservation of ballots, deprived the aldermen of any right to recount such ballots.

Recount by Aldermen. Petition for, not made within prescribed Time. Where the written notice, on the part of ten or more citizens of any ward, required for a recount and examination, by the aldermen, of the votes cast in the ward, is not given to the city clerk within the time provided by law, the aldermen have no right to recount such votes.

Recount by House of Representatives. Votes must be properly preserved, to justify Recount. Where the votes cast at an election, in a town, are not preserved in the manner required by law, but, after the adjournment of the meeting, are taken, in a ballot box, into another room, by the selectmen, then tied up in a paper, put in an unlocked closet, and a day or two later, sealed up, but not delivered to the town clerk until within a day or two previous to the hearing before the committee of the house of representatives, such votes have not been preserved in such a manner as to justify a recount by the house of representatives.

Recount refused. Where the votes cast, in certain wards in a city, were not preserved and transmitted to the city clerk, in the manner required by law, but were transmitted by unauthorized persons, with the ward seals enclosed with them, and afterwards were recounted by the aldermen, without authority, by which recount the declared result of the election was changed, the committee refused to recount the votes, and allowed the declared result to stand.

Evidence. A voter cannot be compelled to state for whom he voted, but his declaration to others, as to how he voted, is competent evidence.

W. H. P. WRIGHT *for petitioner.*
R. M. MORSE, JR. *for sitting member.*

The Committee on Elections, to whom was referred the petition of George E. Davis, claiming the seat in the house of representatives, now held by Patrick Murphy of Lawrence, as a member from the third Essex representative district, submit the following report:

The third Essex district consists of the city of Lawrence (six wards) and the town of Methuen. The petitioner assigns, as the ground for his claim, that the original returns from wards 1, 2, 3,

4 and 5, in Lawrence, were grossly incorrect. That a recount of the votes, cast in those wards, shows that the errors in the original count, and return of such votes, were of such magnitude as to give the sitting member an apparent plurality in the whole district. Whereas, a correct count of the votes in those wards, with the original count of ward 6, and of the town of Methuen (the whole district), shows that the petitioner, and not the sitting member, has a plurality of votes legally cast for representative in this district. The petitioner further alleges that, if a recount of the votes cast in the whole district shall be had, it will appear that he received a plurality of votes cast for representative, and that he is entitled to a seat in the house.

From the records of the city of Lawrence it appeared that in that city the petitioner received 1,205 votes, and the sitting member 1,346 votes; and from the records of Methuen it appeared that in that town the petitioner received 290 votes, and the sitting member 157 votes, making a total vote in the district of 1,495 votes for the petitioner and 1,503 votes for the sitting member, — a plurality of eight votes.

Upon that result, Patrick Murphy was declared to be lawfully elected, and received his certificate of election as a member of the house of representatives, from the third Essex district, and was admitted to a seat in this house.

It appeared in evidence that, ten days after the State election, viz., on the 17th day of November, 1871, the aldermen of the city of Lawrence made a recount of the ballots thrown in wards 1, 2, 3, 4 and 5 of the city (petitions having been sent in from those wards, signed by ten or more citizens, asking for a recount), and found that, taking the vote from ward 6 of the city, as returned by the ward officers, and the vote of the town of Methuen, as declared by the selectmen, and recorded by the town clerk, the result was as follows: —

From recount of five wards in Lawrence, Patrick Murphy had 1,237 votes; George E. Davis had 1,098 votes. In ward 6, as recorded, Davis had 121 votes, and Murphy 112 votes; while, in Methuen, Davis had 290 votes, and Murphy 157 votes; giving, as the new result in the district, George E. Davis 1,509, and Patrick Murphy 1,506 votes, — or a plurality of three votes in favor of the petitioner.

Your committee were of the opinion that the aldermen of the city of Lawrence had no authority to recount the votes: first, for the reason that section 2 of chapter 144 of the Acts of 1863* had been grossly violated.

* Pub. Stats., chap. 7, § 28.

Your committee interpret the meaning of that section, as being something more than directory to the ward officers, and that its provisions must be complied with, to preserve the purity of the ballots, so that a recount could be made by the proper authorities. And it would seem that the only remedy for persons aggrieved, by reason of ward officers not complying strictly with this statute, would be to enforce the 5th section of this same chapter (Pub. Stat., Chap. 7, § 30), wherein it provides for a punishment for neglect of duty, by a fine of not less than twenty or more than two hundred dollars, or by imprisonment in the county jail for a term not exceeding one year.

Upon the evidence before your committee, it appeared that the ballots from nearly all the wards of the city of Lawrence were returned by the clerks of the wards, or some other unauthorized person. And that, from *all* the wards, the ward seals were returned, with the ballots, to the city clerk.

No evidence was introduced to show fraud, or that the ballots had been tampered with previous to the recount by the aldermen, but your committee were of the opinion that, if they overlooked this violation of the law, and judged that the aldermen had a legal right to recount the ballots, it would be establishing a dangerous precedent, tending to uncertainty and fraud in elections. Therefore, believing that the recount by the aldermen was illegal, and it was tampering with the ballots, your committee are of the opinion that it would be neither right nor just to take the recount by the aldermen as the correct result of the election; neither would it be right or just to take the ballots as they now are, purporting to be some, and all, that were cast at the last State election, in the third Essex representative district, and count them at the present time.

Your committee also think that the aldermen of the city of Lawrence had no authority to recount the ballots, at the time they did, for the reason that the notice to the city clerk had not been given within the proper time.

Sects. 12 and 13 of chap. 8 of the General Statutes, relating to the election of representatives to the general court (Pub. Stats., chap. 8, §§ 10, 11 and 12), read as follows:—

SECT 12. The clerks of cities, towns and wards, composing such districts, shall meet at noon, on the day following an election for representatives, at the place so designated, and shall examine and compare such transcripts, and ascertain what persons have been elected. If any error appears in a transcript or return, the clerks shall forthwith give notice thereof to the officers required to make the return, and such officers shall forthwith, in conformity with the truth, and under oath, make a

new return, which, whether made with or without such notice, shall be received and examined by said clerks, within two days after the time appointed for the meeting; and, for that purpose, the meeting may be adjourned, not exceeding two days.

No return shall be rejected, when the number of votes given for each candidate can be ascertained.

SECT. 13. Such clerks shall, at such meeting, make out, under their hands, a complete return of all votes cast for representatives, in the district, the names of all persons for whom such votes were given, and the number of votes for each person; and a record of the return shall be made, in the book of records of their respective cities, towns and wards, within four days after the day of the meeting.

Sect. 3 of chap. 144, Acts of the year 1863 (Pub. Stats., chap. 7, § 36), reads: "If, within the time prescribed by law for forwarding returns or declaring the results of an election, ten or more citizens of any ward shall notify the city clerk, etc." If that portion of the section is complied with, the board of aldermen shall, within the time required by law for examining the returns or declaring the results of the election, examine the ballots, and determine the questions raised.

It seems to your committee, that the proper time to give notice to the city clerk, and the recount by the mayor and aldermen, of the ballots cast for representatives, would be within four days from the time of election, — interpreting the meaning of declaring the results of an election for representatives to the general court, to be, whenever the clerks of towns and cities, comprising a representative district, have met and compared transcripts, and ascertained what persons have been elected.

The selectmen and town clerk of Methuen testified that the law, in regard to the preservation of ballots in towns, passed by the legislature in 1871, was not complied with by them, at the last State election; but that the ballots, after the adjournment of the meeting, had been taken out, in a ballot box, into another room, by the selectmen, then tied up in a paper, put in a closet, which was not locked, and, within a day or two, sealed up; but were never delivered to the town clerk, till within a day or two previous to the first hearing by the committee.

It seemed to the committee, that the ballots from the town of Methuen could not be recounted.

From further evidence before your committee, it appeared that illegal votes were cast in the city of Lawrence, at the last State election. The committee were unanimous as to their opinion in regard to three votes.

One, M. W. Cox, voted in ward 1, in the city of Lawrence. He

had not lived long enough in the State to be entitled to vote. He testified that he voted for George E. Davis, for representative.

One, Holmes Crowpher, voted in ward 1. He was not legally assessed. A majority of the committee thought he had no legal right to vote.

The question was asked him, for whom he voted. The committee ruled that he need not answer unless he chose. He declined to answer. Other evidence was introduced, to show that he said he voted the labor reform ticket, and still further evidence was introduced, to show that the name of George E. Davis was upon that ticket, as a representative, for the third Essex district.*

One, L. S. Hersey, voted in ward 5. In the opinion of your committee, he had not lived there long enough to entitle him to vote.

In answer to the question, For whom did you vote? he replied: Did not know what name was on my ticket. In reply to the question, What ticket did you vote? he said: Voted the republican ticket. In reply to the question, Did you erase any name on the ticket? he said he did not. Upon other evidence, it was shown that the name of George E. Davis was upon the republican ticket, for representative, from the third Essex district.

Your committee, therefore, think that, if they should admit that the aldermen of the city of Lawrence had a right to recount the ballots, and that they should be counted at the present time, it would be fair to presume, from other evidence that was introduced, that Patrick Murphy did receive a plurality of votes for representative, from the third Essex district, at the last State election, and is therefore entitled to his seat in the house of representatives.

We would recommend that the sitting member, Patrick Murphy, is entitled to his seat.

[A minority of the committee, consisting of Messrs. BAILEY, CARTER and ALDRICH, dissented from the conclusions of the majority, and recommended that the seat in controversy be declared vacant. The report of the committee was accepted. H. J., 1872, p. 137.]†

* [On the question, how far the declarations of a person, not qualified as a voter, regarding his vote, and for whom cast, are admissible as evidence, in an election controversy, see foot-note, *ante*, p. 150]

† [NOTE BY THE EDITORS. 1. By the journal of the house for 1872, pp. 3 and 4, it appears that, on the first day of the session, two certificates were presented, from the third Essex district: No. 1, in favor of Patrick Murphy, duly signed by the mayor and aldermen and city clerk of Lawrence, and the town clerk of Methuen, declaring said Murphy duly elected.

No. 2 was a petition for a recount in Lawrence, and contained an amended return,

GEORGE M. HOBBS *v.* GEORGE BARTHOLMESZ.

House Document, No. 130. March 1, 1872. Report by WILLIAM A. ADAMS.

Mistake in name of Candidate. Votes for *George Bartholomesz* will, in an election controversy, be counted for George Bartholmesz, upon proof that the latter was a regular candidate of his party, and that his name was by mistake printed *Bartholomesz*, upon a split ballot, upon which it was intended to place the names of the regular nominees of that party for representative.

EDWARD AVERY, *for petitioner.*

The Committee on Elections, to whom was referred the petition of George M. Hobbs, contesting the seat now held by George Bartholmesz, for the third Norfolk district, having heard the parties, report: That, at the last State election for representatives, in the third Norfolk district, the vote was as follows: —

For Albert Palmer,	1,217
Brownell Granger,	1,255
George Bartholmesz,	1,126
George M. Hobbs,	1,073

The district is entitled to three representatives, and the seats of Albert Palmer and Brownell Granger are not questioned.

The petitioner, George M. Hobbs, contests the seat of George Bartholmesz for the following reasons: —

First. Because there were errors in counting the ballots.

signed by the clerk of the city of Lawrence, and declared George E. Davis duly elected.

A motion made to refer both certificates to a special committee of five, was rejected by a vote of 67 yeas to 92 nays. H. J., 1872, p. 4.

It was then voted that Patrick Murphy has a *prima facie* right to occupy the seat for the third Essex district: yeas, 121; nays, not counted.

2. The editors agree that the decision of the house in this case was correct. But they do not understand the final remark of the committee. They say, in substance, that, conceding the right of the aldermen of Lawrence to recount as they did, and that the votes should be counted by the committee, still it would be fair to presume, from other evidence introduced, that Patrick Murphy did receive a plurality of the votes cast in said district. The evidence was, that three persons voted illegally for Mr. Davis. His plurality, as declared by the recount, was three votes. Deducting these from Mr. Davis' entire vote, and there was a tie in the district.

Semble. It seems that, where two certificates for the same seat in the house of representatives, are presented by two different persons, on the day of the organization of the house, one purporting to be the result of the original count of the election officers, and the other the result of a recount, the seat, *prima facie*, will be given to the person holding the first certificate.]

Second. Because votes were cast for George Bartholomesz, which were counted for Bartholmesz, when they should have been rejected, or counted as for another person.

The following facts were agreed upon: That one of the regular republican nominees, for representative, was George Bartholmesz, and that his name was on the "regular republican ballot"; that a "split ballot" was printed and circulated, bearing the same names as the "regular republican ballot," with the exception of the names of the candidates for senator and register of probate, and the name of George Bartholomesz, for representative, in the place of George Bartholmesz, and that some of these ballots were probably thrown; that there was no person by the name of George Bartholomesz living in the district; and that the ballots thrown at the election for representative have been preserved.

On these facts, the petitioner contends that the committee should recount the ballots, and ascertain the number thrown for George M. Hobbs, George Bartholomesz and George Bartholmesz; that the votes for Bartholomesz should not be counted for Bartholmesz; that no evidence should be allowed, to show that the votes for Bartholomesz were intended for Bartholmesz; and that, if there were more votes thrown, with the name of George M. Hobbs, than with the names of George Bartholomesz or Bartholmesz, he, Hobbs, was entitled to the seat.

The sitting member claims, that, there being no such person as George Bartholomesz living in the district, he should be allowed to show that this name is a mistake of the printer, and is simply a misspelling of Bartholmesz, and that no such difference was known until after the election; and introduced Jacob Jacobs, a resident and voter in this district, who testified that he prepared, and had printed, the "split ballot" referred to, and that he directed the printer to place upon the "split ballot" the same names as were on the "regular republican ballot," with the exception of the names for senator and register of probate; that these ballots were circulated, and he never knew, or heard, any mention made, of any difference in the names of the representatives, until the Sunday after the election.

On these facts and arguments, your committee, without going into any elaborate argument on the subject, submit the case to the consideration of the house, with the recommendation that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1872, p. 214.]

HOUSE—COMMITTEE ON ELECTIONS, 1873.

EDWARD L. BIGELOW of Marlborough, *Chairman*, THOMAS INGALLS of Marblehead, AUSTIN HAWLEY of Sandisfield, JOHN W. REGAN of Boston, GEORGE COPELAND of Easton, A. S. ATHERTON of Warwick and DENNIS BONNER of Boston.

ALFRED J. FRENCH *v.* HORACE C. BACON.

House Document, No. 10. January 15, 1873. Report by all the Committee.

Evidence. Ex-parte Affidavits. Where the petitioner, to prove that more votes were cast for him, in a ward, than were returned for him by the election officers, presented the affidavits of thirty-nine more persons than there were votes returned for him, taken two months after the election, each person swearing that he voted for the petitioner, it was *held*, that it would be a dangerous precedent to unseat a member upon such affidavits alone, without evidence of fraud on the part of election officers, but such affidavits might be considered, in connection with other evidence, tending to establish fraud.

Irregularities. Mere irregularities in the conduct of the election, in the absence of fraud, or proof that the result was affected, will not invalidate the election.

EDGAR J. SHERMAN *for petitioner.*
ROBERT M. MORSE, Jr. *for sitting member.*

The Committee on Elections, to whom was referred the petition of Alfred J. French, asking for the seat in the house of representatives now occupied by Horace C. Bacon, from the third Essex district, having heard the petitioner, submit the following report:

At the request of the committee, the petitioner filed the following statement, in support of his petition: —

"Essex Representative District, No. 3, is composed of the six wards of the city of Lawrence, and the town of Methuen.

"By the returns of the ward and town officers, your petitioner received 2,163 votes, and Horace C. Bacon 2,162 votes, electing your petitioner.

"A recount of the votes of the several wards of the city of Lawrence (but not of Methuen), gave Mr. Bacon 14 additional votes, increasing his total vote to 2,177, the vote of your petitioner remaining as before.

"In ward 4, Lawrence, the return of the ward officers, changed only one vote; by the recount, your petitioner was given 271

votes, and Mr. Bacon 584. On the check-list, returned and certified by the ward officers as having been used at said election, and herewith produced, 855 names are checked as having voted, corresponding, within one, of the aggregate vote of your petitioner and the sitting member in said ward.

"Your petitioner presents the depositions of 310 legal voters in said ward, whose names are borne on the check-list, and all checked by the ward officers, as aforesaid, who make oath that their ballots bore the name of your petitioner, as representative to the general court, being 39 votes in excess of the number given him by the ward officers, in their return.

"The aggregate vote of the ward, for representative, as aforesaid, fully equalling the names checked as having voted, these 39 votes, of which your petitioner has been wrongfully deprived, should not only be added to his total, but taken from the number given to the sitting member, resulting in the election of your petitioner by a majority of 64 votes.

"Your petitioner proposes to show, by the magistrates who administered the oaths, that the deponents are the same persons whose names are checked on said list, as having voted.

"Your petitioner further proposes to show, that all of said ward officers were of one party, and, during the election, were conspicuous in displaying partisan feeling and bias; that the room occupied by the said ward officers, in the custody and counting of the votes, was separate and apart from the ward room; that the ballots were removed from the box, entirely out of sight of the voters; that the room, in which they were kept and assorted, was made the depository of piles of unused democratic tickets, which were, by said officers, from time to time, passed out over the ballot box, to their party vote distributors; that the ward officers refused a request to permit the police officers, on duty in the ward room, or any person of the opposite party, to be stationed within the room, where they could see the ballots while being counted; that the warden, and others of the ward officers, while acting as such, had several bets of money upon the result of the then pending election.

"With the submission of these depositions, and the other evidence, all of which your petitioner believes to be strictly and truly in accordance with the fact, he desires that your committee should summon any of the deponents, concerning the truth of whose deposition the sitting member may entertain doubt, to such numbers as may seem reasonable to your committee, and, if by you considered possible, or even practicable,— either as to expense in summoning and paying, or time in examining,— to include the entire 855 or 309 witnesses.

"Your petitioner, in the interest of a fair vote and pure ballot, will patiently attend and aid the committee in the investigation.

"These facts, proven by whichever form of evidence or procedure your committee deem to direct, establish conclusively, a degree of fraud, error, or gross negligence, rendering it impossible to determine its further extent, or amount, and demanding that the vote of this ward should be thrown out of the count, and the election determined by the returns from the remainder of the district, upon which rests no taint of dishonesty, or uncertainty, thereby electing your petitioner by 299 majority."

At the first hearing of your committee upon the petition of Alfred J. French, the counsel for the petitioner presented 309 affidavits, a copy of one of which is as follows: —

"COMMONWEALTH OF MASSACHUSETTS.

"ESSEX, ss. I, Alfred Ash, a legal voter in ward 4, of the city of Lawrence, and Commonwealth of Massachusetts, certify that, on the 5th day of November, A.D. 1872, I deposited in the ballot box, in said ward, a ballot bearing the names of all the republican candidates for presidential electors, and also the name of Alfred J. French, for representative to the general court, from Essex District, No. 3. ALFRED ASH."

"ESSEX, ss. LAWRENCE, *Dec.* 30, 1872. Then personally appeared the aforesaid Alfred Ash, and made oath, that the foregoing statement, by him subscribed, is true. Before me,

"A. V. BUGBEE, *Justice of the Peace.*"

And requested that your committee present the affidavits, with a statement of the case, to the house of representatives, and let them decide the matter, should the committee care not to assume the responsibility of judging upon them, it being the first case of an election contested under similar circumstances, so far as they have any knowledge, in this Commonwealth.

Your committee were aware of the dangerous precedent it might establish, should a member of the house of representatives be unseated by affidavits, without evidence of fraud on the part of the ward officers conducting any election, and they decided that it was competent for them to judge of what weight they might have, in connection with evidence that might be introduced to establish fraud, and that they would take the responsibility of deciding the case, and, if their judgment should prove false, the house of representatives, in its wisdom, could reverse their decision.*

* [NOTE BY THE EDITORS. It was settled in Congress, as early as 1805, that, in a hearing upon the controverted election of a representative, the committee would not consider affidavits which were wholly *ex parte*, and taken without proper notice to the opposing party as evidence. *Spaulding* v. *Mead*, Clark & Hall, Congres-

From the records of the city clerk of Lawrence, the returns of votes, thrown in the several wards of the city of Lawrence, on the 5th day of November, 1872, for representative to the general court, show that in

WARDS.	1.	2.	3.	4.	5.	6.	TOTAL.
Alfred J. French had . .	398	390	282	271	325	176	1,842
The vote in Methuen was .	–	–	–	–	–	–	321
Recount by the aldermen of Lawrence, Nov. 7, . .	399	390	283	271	323	176	2,163
Gained, ...	1	–	1	–	–	–	
Lost, ...	–	–	–	–	2	–	
Horace C. Bacon had . .	269	363	345	583	240	139	1,939
Recount, Nov. 7, . . .	283	364	344	584	241	138	1,954
The vote in Methuen, . .	–	–	–	–	–	–	223
							2,177
Gained, ...	14	1	–	1	1	–	
Lost, ...	–	–	1	–	–	1	

The evidence, as it appeared to your committee, was substantially as follows: —

That the ward room of ward 4 of the city of Lawrence, used at the last state election, was a room having folding doors, by means of which the said room could be made into two rooms, the one being nearly twice as large as the other; that a table four feet eight inches wide was placed in said room, and the folding doors drawn up to the table on each side, thus making of the larger room, above described, a ward room separate from the audience room in front of the said table; that behind this table sat the ward officer who held the ballot box, and in front of it was a rail, between which and the table the voters passed, to deposit their

sional Election Cases, 157. The rule was reaffirmed, in 1868, in *Hogan* v. *Pile*, 2 Bartlett Cong. Election Cases, 281, 287, and in 1878, in *Wigginton* v. *Pachedo*, 1 Ellsworth Cong. Election Cases, 5, 8. In the *New Marlborough* case, Mass. Election Cases, Cushing, S. & J. 323, the committee of the house ruled that depositions are not admissible in evidence, to invalidate an election, unless the member, whose right is in question, has been notified of the intention to take them, or was present at the taking.]

ballots; that behind the table upon which was the ballot box, was another table, at which sat the other election officers, and upon which the ballots were counted; that the warden did not empty the ballot box till about half an hour before the polls closed, and then he assisted in counting ballots; that no person, except the ward officers and the janitor of the building, was in the room occupied by said ward officers, during the day, and no person applied for admission; that two police officers, by order of the city marshal, were stationed in the audience room, to preserve order, and they were there all day, except at noon, when they were away half an hour for dinner; that, after the polls were opened in the morning, democratic ballots were passed out of the ward room, over the ballot box, to ballot distributors, it having been a custom, in that ward, to keep ballots in the closet, in that part of the room occupied by the ward officers; that "somewhere, sometime, some one had bet that Grant would carry Lawrence," and the warden, who presided, had "bet that he wouldn't;" that republican ballots were distributed, with "Bacon pasters" over the name of one of the republican candidates for representative, and such ballots were cast, in one of the wards of the city; that most of the affidavits were taken nearly two months after the election.

One of the magistrates, before whom the affidavits were taken, said that out of the 125 that he thought made oath to him, he knew the greater portion of them. Another magistrate said that of the 150 that made oath to him, he recognized 100 or 125 as belonging to ward 4.

That, of the three other witnesses, that were examined from this ward 4, whose affidavits were shown to them, one Daniel Donovan, on cross-examination, said "he did not recollect whether the ticket that he voted had the name of Alfred J. French upon it."

The committee were requested to summon and examine persons who voted in ward 4 at the last state election. They could foresee some of the difficulties that might arise from the examination of so many witnesses, but, had the discrepancy been greater, your committee felt that they could have been justified in the expense and time which it would necessarily involve; but, under the circumstances of this case, they declined to do so.

The committee were of the opinion that no evidence of fraud had been proved, but that there were irregularities in the ward room, and that the contestant, Mr. French, did have suspicions that there had been fraud, and that he had been wronged; but, inasmuch as it would be a dangerous precedent to establish, to let the affidavits of persons (to a certain limit, at least) decide who

was entitled to a seat in the house of representatives, in the absence of any evidence of fraud on the part of ward officers, your committee feel that they could report in no other way, than that they recommend that the sitting member, Horace C. Bacon, is entitled to his seat.

[The report of the committee was accepted. H. J., 1873, p. 54.]

ALBERT A. AUSTIN *v.* ANDREW H. SWEET.

House Document, No. 48. February 4, 1873. Report by E. L. BIGELOW, *Chairman.*

Recount of Votes refused. The mere fact that the sitting member was given, by the returns of votes, only seven plurality over the petitioner, and that the petitioner claims that a recount of the votes would show a plurality in his favor, will not justify a recount by the house of representatives.

Rule in *Burt* v. *Babbitt, ante,* p. 174, reaffirmed.

The Committee on Elections, to whom was referred the petition of Albert A. Austin of Norton, asking for a recount of the votes thrown for representative, in the second Bristol district, submit the following report: That it appears, from evidence before the committee, that the vote for representative, in the towns of Norton and Mansfield, comprising the second Bristol representative district, was as follows: —

Town of Norton, for Andrew H. Sweet of Norton, . .	161	
Town of Mansfield, for Andrew H. Sweet of Norton, .	155	
Total for Sweet, ...	—	316
Town of Norton, for Albert A. Austin of Norton, . .	97	
Town of Mansfield, for Albert A. Austin of Norton, .	212	
Total for Austin, ...	—	309

Thus showing that, by the count, as made and returned by the selectmen of Norton and Mansfield, Andrew H. Sweet of Norton, the sitting member, was elected by a plurality of seven votes.

The petition of the contestant reads as follows: —

"*To the House of Representatives of the Commonwealth of Massachusetts.*

"Albert A. Austin of Norton, in the county of Bristol, respectfully represents, that he claims an election as representative in general court in place of Andrew H. Sweet, Esq., who now represents the second dis-

trict in the county of Bristol, in your body. That, within sixty days after the election, held November 5th, 1872, he served a notice on the clerks of the towns of Norton and Mansfield, respectively, claiming an election. And he now prays, that your body will order a recount of the ballots, cast at said election, for representative in general court, he claiming that such recount will show a majority in his favor, and that the certificate of election should be issued to your petitioner.

ALBERT A. AUSTIN."

The committee have been governed in their decision, in this case, by a rule adopted by a former committee on elections, which was endorsed by the house of representatives, as a precedent to govern future committees on elections, in similar cases, which is this: That, in the absence of any proof or evidence of fraud in the acts of the selectmen, or of illegality in the manner of calling, holding or conducting the meeting, at which the election is held, or in the manner of ascertaining the election of representatives, unless the petitioner shows a reasonable ground for supposing an error in the count, as made and returned by the selectmen, other than the mere fact of there being but a few votes between the number of votes thrown for the contestant and the sitting member, the committee will not recount the ballots that may be produced.

No evidence having been offered, before your committee, in support of the petitioner's claim, other than the fact that there is but seven votes' difference in the number of ballots cast for the sitting member and the petitioner, the committee therefore recommend, that the sitting member, Andrew H. Sweet, is entitled to his seat.

[The report of the committee was accepted. H. J., 1873, p. 111.]

SENATE—1874.

Special Committee on Return of Votes for Senators — Hon. JONATHAN A. LANE, Hon. BROOKS T. BATCHELLER, Hon. PRENTISS C. BAIRD, Hon. THOMAS INGALLS and Hon. WALTER N. MASON.

JEREMIAH CLARK *v.* WILLIAM F. SALMON.

Senate Document, No. 2. January 12, 1874. Report by Mr. LANE, *Chairman.*

Defect in Name on Ballot. A ballot, in which the name of the regular candidate for senator was covered by a paster, loosely attached, bearing the name of *Jeremiah Cla*, the end of the paster, evidently containing the last two letters of the name *Clark*, having been torn off, should be counted for Jeremiah Clark, who was the regular candidate of the opposing party for that office.

Failure to erase Name. Where, on ballots for State officers, containing the printed name of Jeremiah Clark, for senator, there was written, in pencil, upon the margin, at the bottom of the ballot, "W. F. Salmon, senator," the name of Clark not being erased; — or where a strip was securely attached, by pins, just below the name of Clark, on which was printed, for senator, etc., William F. Salmon, such strip not covering the name of Clark, so that, on each ballot, the names of both candidates for the office appear; — the votes cannot be counted for either candidate.

Same. Where, on a ballot for State officers, upon which the name of Salmon was printed, as the regular democratic candidate for senator, the name of Clark, who was the regular republican candidate, was pasted over the name of the candidate for some other office than that of senator, leaving the name of Salmon, for senator, unimpaired, — there being on the paster no designation of the office for which Clark was named, — the vote cannot be counted as a vote for Clark, for senator, but will be counted for Salmon.

JOSHUA N. MARSHALL *for petitioner.*
GEORGE F. RICHARDSON *for sitting member.*

The Special Committee, on the returns of votes for senators, to which was committed the petition of Jeremiah Clark of Lowell, asking for a recount of votes for senator, in the seventh Middlesex senatorial district, with power to send for persons and papers, report: That they have attended to this duty, without delay, the clerks of the towns of Dracut and Chelmsford, and of the city of Lowell, being summoned to appear, with all the ballots cast for senator, in that district, at the last election, and with such other papers as might be of aid to us; that said clerks duly appeared, and were duly sworn; that the ballots, which they brought with them, had been duly sealed, and kept according to the requirement of the stat-

ute, and were all the ballots cast at said election, for senator, in said seventh Middlesex district. Whereupon said clerks retired, and we proceeded, four members of the committee being present, to a careful count and examination of all of said votes, every vote passing through the hands of every member of the committee present.

In the process of said counting and examination, all votes that were of a doubtful character, — concerning which your committee felt that a deliberate reconsideration or reflection might be necessary, — were carefully put aside, into envelopes, and the locality where they were cast marked upon them. Of such votes, they found, (in the process of counting all) five only— two from ward 6, in Lowell, and three from ward 1. These were carefully set aside, and, at the close of the recount, taken into the possession of the chairman of your committee.

The result of our recount, exclusive of the five votes, was as follows: —

	Clark.	Salmon.	Scattering.
Town of Dracut, ...	140	81	1
of Chelmsford, ...	224	119	–
City of Lowell, ward 1, . . .	191	229	–
" " " 2, . . .	270	300	–
" " " 3, . . .	329	464	–
" " " 4, . . .	371	383	–
" " " 5, . . .	412	416	–
" " " 6, . . .	217	162	1
	2,154	2,154	2

This result is so surprising, that we think it proper here to say, that we did not put these figures in column, to determine their aggregate, until we had completed our recount and examination.

Upon the decision, then, to whom we give the five votes, previously referred to, depends the result of this election. We therefore refer to them in detail.

Vote number one was a democratic ticket, on which the name of William F. Salmon, senator, seventh Middlesex district, was cov-

ered by a paster, loosely attached, bearing the name Jeremiah Cla, a portion of the end of the paster having been evidently torn off, taking the last two letters of the name Clark. This vote, which probably, by legal technicality, might be thrown out, your committee, without hesitation, give to Jeremiah Clark, believing it to be intended for him, *without doubt*, but somewhat damaged in the handling.

Numbers two and three, of these equivocal votes, were so alike in character, that we speak of them and class them together.

They were republican tickets, having in bold letters, on the centre, For senator, seventh district, Jeremiah Clark of Lowell. One of these votes had written upon the margin, at the bottom of the ballot, in pencil, W. F. Salmon, senator. The other had, securely attached by pins, just below the name of Clark, a strip cut from a democratic ticket, printed, For senator, seventh Middlesex district, William F. Salmon of Lowell. These votes indicate a purpose, on the part of the voters, to give their suffrages to Salmon, for senator, but, omitting to erase or cover the names of the other senatorial candidate, the names of *both candidates*, for senator, appear on each ballot.

Your committee decide that, although it may seem unfair to Salmon, on principles of equity, yet, as a matter of rule and duty, both should be thrown out.

We reach, then, the two remaining ballots, numbers four and five, which we also class together. They are both democratic tickets, and on them the name of William F. Salmon, for senator, seventh Middlesex district, is unimpaired and unimpinged; but, on one of them, the name of Jeremiah Clark is pasted over that of John C. Blood, representative, and doubtless depriving him of one vote; on the other, the name of Jeremiah Clark is pasted at the top of the ballot, over the name of Benjamin F. Mills, secretary of state, and partly covering that of Nathan Clark, treasurer and receiver-general. *The designation of senator, seventh Middlesex district, does not* appear on either of these pasters.

It may be imagined, and was thus argued before your committee, that these pasters were designed to be senatorial votes for Clark. *Your committee cannot allow themselves to go so far, in attempting to divine the intent of blunderheads at the polls*, as to thus judge in this affair.

We believe that, in good sense and good law, these two votes should be credited to William F. Salmon of Lowell, senator.

Thus, the five doubtful votes are disposed of, by your committee: one given to Clark, two thrown out, two given to Salmon; and, by the united judgment of the acting members of this committee, Hon.

Willliam F. Salmon of Lowell is confirmed in his seat by a plurality of one vote.*

* [NOTE BY THE EDITORS. *Construction of defective Ballot.* In an election controversy the ballot must be construed by the same rule that governs courts in the construction of written contracts and wills. The rule is stated by Chief Justice Shaw: "The maxim is, to give some effect to the acts of parties, if possible, *ut res magis valeat quam pereat;* and in construing all instruments, and especially those which are informal, illiterate, hastily and unskilfully drawn, the intent of the parties, if possible, is to be ascertained, without regard to technical rules; words are to be construed in the manner in which the parties understood them; resort is to be had to every clause and word in the instrument, for the purpose of ascertaining that understanding and intent; and the intent of the parties when thus ascertained, is to be the governing rule for carrying the contract into effect." *Atwood* v. *Cobb*, 16 Pick. 227, 229. "We are to be governed, not by technical and artificial rules, but by the true intention of the parties, as expressed by the language of the contract. This rule of construction is well established by all the modern cases." *Wilde, J.*, in *Howland* v. *Leach*, 11 Pick. 151, 154. The language and form of a ballot are to be construed, if possible, to give effect to the voter's intention, if that intention can be ascertained from the ballot itself, in the light of all the circumstances surrounding the election. Informalities or technical inaccuracies in the expression by the voter of his intention, will not invalidate his vote if that intention is sufficiently shown by his ballot. As stated by Judge *Cooley*: "Every ballot should be complete in itself, and ought not to require extrinsic evidence to enable the election officer to determine the voter's intention. Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is never required in any case. The cardinal rule is to give effect to the intention of the voter, whenever it is not left in uncertainty." Constitutional Limitations, 4th ed., pp. 764, 765. And see *People* v. *Matteson*, 17 Ill. 169; *Hawes* v. *Miller*, 56 Iowa, 395; *Cattell* v. *Lowry*, 45 *Ib.* 478; *State* v. *Goldthwait*, 16 Wis. 146. But this intention must be ascertained from the ballot alone, taken in connection with the circumstances of the election. While, as stated in *Wright* v. *Hooper*, and footnote, *ante*, pp. 100-105, extrinsic evidence to explain and apply an imperfect or incorrect ballot may be admissible, it can never be received to contradict what is written upon the face of the ballot. McCrary Elections, § 407. *People* v. *Seamans*, 8 Cowen (N. Y.), 409. Where, then the intention is to be ascertained wholly from an inspection of the ballot, it is a question of law, like the construction of a written contract. *People* v. *McManus*, 34 Barb. (N. Y.), 620.

Erasure on Ballot. Where an erasure by mark or pasting is found upon a ballot, even if the name on the ballot is not entirely obliterated, the presumption is that the voter intended "to scratch" the name upon which he has made the erasure, and that intention, if apparent, will be given effect. "Where a pen or pencil mark is drawn over a name, which has been printed on a ballot, it will be presumed that an erasure of the name was intended, although it be still legible, unless the contrary is shown. It is not necessary to obliterate the name entirely." McCrary Elections § 411. In *Clark* v. *Robinson*, 88 Ill. 498, William E. Robinson and E. E. Clark were the two candidates for the office of clerk of the circuit court. Upon a controversy over the election, votes on the Clark ballots for "*W. E. Robso*" and "*W. E. Robers*" were counted by the court for William E. Robinson; and where the name of E. E. Clark on the printed ballot was erased, and the word "*Robis*" written on the margin to the left of the words, "for Circuit Clerk," with a light mark at the end of the name, the vote was also counted for Robinson. The question whether a name on a ballot has been erased is a question of fact to be determined by inspection of the ballot. *Coffey* v. *Edmonds*, 58 Cal. 521.

Omission to erase printed Name on Ballot. The finding, by the committee in the above case, that where the name of the opposing candidate is written upon the ballot, but the printed name of his opponent is left unerased, the vote cannot be

Your committee feel bound to add that, upon returning to their room, this morning, for a hearing, they found upon their table a paster,—William F. Salmon, senator. Whether this was a vote

counted for either, is opposed to the great weight of authority. In a similar case, *People* v. *Saxton*, 22 N. Y. 309, the court held that, "writing a name upon a ballot, in connection with the title of an office, is such a designation of the name for that office, as to satisfy the statute, although the voter omits to strike out a name printed upon it, in connection with the same office. The writing is to prevail, as the highest evidence of his intention. The judge ought to have charged the jury, as a matter of law, that they were bound to find the fact, accordingly, from the face of the ballot itself." And see, to the same effect *People* v. *Love*, 63 Barb. (N. Y.) 535; *Clark* v. *Robinson*, 88 Ill. 498. Mr. McCrary follows these cases, saying: "If a voter has *written* upon his ballot the name of a particular person, in connection with the title of an office, and omits to strike out the name of another person *printed* upon it, in connection with the same office, the writing must prevail, and the vote must be counted for the person whose name is written. This is upon the ground, that the writing is the highest evidence of the voter's intention. In such a case, the voter's intention can be clearly ascertained from the face of the ballot; there is no ambiguity, and, therefore, evidence *aliunde* is not admissible to explain it, and the court must, in such a case, find, as a matter of law, that the writing on the face of the ballot, prevails over the printing." McCrary Elections, §§ 408, 409. See, also, Cooley, Con. Lim., 4th ed., p. 765. It has, however, been held, under statutes providing that if a ballot contains more than one name for a single office, it shall be void as to all names designated for that office, that a ballot containing a written name, without erasure of the printed name of another person for the same office, it cannot be counted for either. *People* v. *Cicotte*, 16 Mich. 283; *Newton* v. *Newell*, 26 Minn. 529.

Pasting Name in wrong Place on Ballot. Where the slip or paster containing the substituted name is pasted over the name of the opposing candidate, so as only partially to obliterate it, the vote will be counted for the substituted name, where the intention to make the substitution is apparent. *Keeler* v. *Robertson*, 27 Mich. 116. The question here is one of fact, to be judged from the ballots, and the circumstances of the election. This was settled in *People* v. *Love*, 63 Barb. (N. Y.), 535, where pasters for supervisor were so fastened on printed ballots, as wholly or partially to cover the designation of the office contained on the ballot next under that of supervisor,—that of town clerk,—so that with the paster on it, the ballot apparently contained two names for supervisor, instead of one for supervisor and one for clerk. The court held that such ballots should be counted for the name on the paster for supervisor, on the ground that, "The acts of the voter are to receive a reasonable construction, in view of the surrounding circumstances. The placing of a paster containing one name over another name indicates an intention to substitute one name for another. If it be placed over another name, which is under the title of an office, it indicates an intention to substitute, for that office, the name upon the paster. If it be done in such a manner as to afford any ground for doubt, whether the voter intended to designate two persons for the same office, we think that doubt may be safely left to be solved by a jury, in view of all the facts, the appearance of the ballot, and the surrounding circumstances."

Votes with no Designation of Office cannot be counted. The committee in the above report are sustained by authority in holding that a name written or pasted on a ballot, upon which more than one office is to be voted for, without a designaton of the office for which the name so placed is voted, cannot be counted. In *State* v. *Griffrey*, 5 Nebraska, 161, the court say: "No office whatever is designated on the face of these ballots, and the proposition will hardly be questioned, that some designation of office stated on the ballot is one of the essential properties to constitute it a legal ballot. Without some designation of office, the ballot would be meaningless,

of itself, which escaped our notice, or a paster which had fallen off, having been already counted, your committee could not determine. It does not affect the result.

[The report of the committee was accepted, S. J., 1874, p. 24.]

THADDEUS GRAVES *v.* FRANCIS EDSON.

Senate Document No. 5. January 15, 1874. Before special committee on return of votes for senators, before named; report by Messrs. LANE, BATCHELLER, BAIRD, INGALLS and MASON.

Recount of Votes refused. The fact that the votes in a town were, in part at least, counted by only one of the selectmen, and the coincidence that, although there were a number of split tickets in the field, the vote for each of the two candidates for senator was returned as exactly the same as for each of the two candidates for governor, will not, in the absence of evidence of illegality, fraud, error, or reasonable ground for supposing either of them to exist, justify a recount of the votes for senator.

The rule in *Burt* v. *Babbitt*, *ante*, p. 174, affirmed.

The Special Committee on the returns of votes for senators, to which was committed the petition of Thaddeus Graves of Hatfield, contesting seat of Francis Edson of Hadley, for Hampshire senatorial district, report, that the petitioner, in this case, desires a recount of votes throughout the district, for the reason that he believes the returns embody substantial errors, owing to mistakes in counting the ballots. He also declares his conviction, that votes were cast by minors, and others not entitled to vote, sufficient to change the result.

Upon the hearing given Mr. Graves, the charge of illegal voting was abandoned by him, and he rested his case entirely on these grounds:

and it would be impossible for the officers of the election to determine for what office the persons named on it were intended. But it is not essential that the ballot should, with technical accuracy, designate the office. This is not an indispensable requirement of the law, and, therefore, in case the office should be imperfectly, or in part, mistakenly designated, then, under the application of the common sense rules, which are applied in other cases of defective writings, if the proof of circumstances surrounding the election will reasonably explain the ballot, and correct the mistake or defect, it may be sustained, and effect given to the intention of the voter. But in the case under consideration, as no office at all is designated, there is nothing to explain, and no defect or mistake to correct.." And see, to the same effect, Cushing, Law and Practice of Leg. Assemblies, § 105.]

That in Northampton, the largest town in the district, and where he fell much behind his ticket, all the parties who counted the votes, were opposed to his election, and the manner of counting was unusual and unsafe. That in the town of Easthampton, there was so remarkable a coincidence in the figures of the returns, that it demands an investigation by recount.

The petitioner was not prepared to prove, nor did he allege, any illegality in either case; the unsafe method of counting in Northampton, was, that the votes were, in part, at least, counted by only one of the selectmen; and the coincidence in Easthampton was, that while there were a number of tickets in the field supposed to be playing at cross-purposes, the returns show, that he received exactly the same number of votes as the governor elect, while his opponent received exactly the same number as did William Gaston for governor.

Mr. Graves also put in a petition, addressed to your committee, signed by about 125 persons, praying for a recount of votes in this district for the purpose of verifying the result.

Your committee forbear any comments on this case, and beg to refer the honorable senate to the case of *Burt* v. *Babbitt*, *ante*, p. 174, where, in a similar case, a committee of the house, one of whom is now a member of this body, reported and recommended the following rule, which we also commend to the senate for their consideration.

The rule is this: that, in the absence of any proof or evidence of fraud, in the acts of the selectmen, or of illegality in the manner of calling, holding or conducting the meeting at which the election is held, or in the manner of ascertaining the election of representative, unless the petitioner shows a reasonable ground for supposing an error in the count as made, and returned by the selectmen, other than the mere fact of there being but a few votes between the number of votes thrown for the contestant and the sitting member, the committee will not recount the ballots that may have been preserved.

As in this case there is no evidence of illegality or fraud, nor reasonable ground for supposing any to exist, or for supposing any error in the count, save the fact that the sitting member had a small plurality, your committee do not feel justified in ordering persons and papers for a recount of all the votes in this district; and, therefore, report leave to withdraw.

[The report of the committee was accepted. S. J., 1874, p. 33.]

THOMAS L. JENKS *v.* FRANCIS B. HAYES.

Senate, unprinted. January 10 and 27, 1874. Before special committee on return of votes for senators, as before named. Report by JONATHAN A. LANE, *Chairman.*

Practice. Specifications may be filed under Petition for Seat. It *seems* that a claim for a seat in the senate should be made by a *petition*, stating the ground upon which the seat is claimed; but where the petition does not state such ground, the petitioner may be allowed to file specifications alleging it.

PATRICK A. COLLINS *for petitioner.*

In this case the claim of the petitioner was as follows: —

"*To the Honorable the Massachusetts Senate:* The undesigned hereby claims to be the duly elected senator from the second Suffolk senatorial district, and contests the right of Francis B. Hayes to represent said district. THOMAS L. JENKS.

"BOSTON, Jan. 7, 1874."

The committee report that said Jenks does not, in the paper referred to as a petition, and upon which our action is based, appear as a petitioner, but as a claimant, nor does he declare the ground upon which he rests his claim, or set forth any reason why Francis B. Hayes, who by our report on return of votes for senators is declared to be duly elected, is not rightfully entitled to represent said district. Your committee, therefore, report that said Thomas L. Jenks have leave to withdraw.

[The report of the committee was recommitted, and the committee authorized to send for persons and papers. S. J., 1874, p. 21. The petitioner then presented by his attorney, specifications, and under them, the committee examined the check-list and votes in the wards of the district, in which irregularities were claimed, and found that no irregularities existed. The petitioner informed the committee that he was satisfied with the investigation, and requested leave to withdraw. The committee reported leave to withdraw, and the report was accepted. S. J., 1874, p. 54.]

HOUSE—COMMITTEE ON ELECTIONS—1874.

Messrs. THOMAS M. JUDD of Lee, *Chairman*, DENNIS BONNER of Boston, JAMES L. MERRITT of Scituate, SAMUEL P. BILLINGS of Hatfield, JAMES D. HURLBUT of Bolton, E. H. SEYMOUR of Granville, and N. E. HOLLIS of Braintree.

THOMAS J. ANDERSON *v.* JOHN TEWKSBURY.

House Document, No. 32. January 29, 1874. Report by THOMAS M. JUDD, *Chairman*.

[In this case, the petitioner claimed that the sitting member was not eligible to the office of representative from ward 3, Boston, from which he was elected, as he had not been an inhabitant of that ward for one year next preceding the date of his election, and the committee, upon the evidence, so found, and reported a resolution, declaring the seat vacant. The house accepted the report and adopted the resolution. H. J., 1874, p. 77. Sufficient facts are not reported to make the case of value as a precedent.]

HENRY D. LAY ET ALS., PETITIONERS.

House Document, No. 34. January 30, 1874. Report by THOMAS M. JUDD, *Chairman*.

[In this case, the election had been declared a tie, between the petitioners, Henry D. Lay and Charles M. Brown, each being found by the transcripts of the records of votes for representative in the district, to have received the same number of votes. A new election was then held, which resulted in the election of one

Moses Carr, who died before the meeting of the legislature. Mr. Lay and Mr. Brown then petitioned for a recount of the votes cast for representative, at the regular election, in which they were opposing candidates, and at their request, finding that the ballots had been properly sealed up and preserved, the committee recounted the votes, and found, that instead of a tie vote, as declared, Mr. Lay had a plurality of three; and, thereupon, reported that he was entitled to the seat. The report of the committee was accepted. H. J., 1874, p. 80. And Mr. Lay qualified. *Ib.* *p.* 86.]

CHARLES A. PERRY *v.* ALBERT MONTAGUE.

House Document, No. 39. February 4, 1874. Report by Messrs. JUDD, BONNER, MERRITT, SEYMOUR and HOLLIS, — Messrs. BILLINGS and HURLBURT dissenting.

Election void for Uncertainty. It *seems* that in a representative district composed of five towns, if the election in one of the towns is void for uncertainty, the election in the district should be set aside.

Election void. What Irregularities will make. Where, in such town, the record did not state the whole number of votes given for any officer voted for; where the number of votes recorded did not correspond with the number of names checked on the voting list; where it was uncertain how many of the selectmen participated in counting the votes; where there was evidence from bystanders (legal voters), who overlooked the count that they saw enough more votes cast for the petitioner than were counted for him, to change the declared result, and verified the fact by going to the poll-room the morning after election and finding the votes unsealed, recounted them; where depositions of persons equal in number to the number of votes found by this recount to have been cast for the petitioner, to the effect that they voted for the petitioner, were offered in evidence; and where the votes cast were not preserved as required by law,—it was *held* by a majority of the committee, that the election in that town was void, and, by the house of representatives, that the election in the district was void.

Evidence. Depositions may be taken and used. It seems that, where the petitioner notified the returned member of his intention to contest the election, and also notified such member and the selectmen of the town that he intended to take testimony in the same, at a time and place named, to prove fraud or mistake in the record and return of votes, and requested them to be present and examine the witnesses, if they desired, the depositions of witnesses, so examined, although none of the parties, so notified, attended, will be received as evidence, with the same effect as though taken before a commissioner duly appointed by the house.

Irregularities in conduct of Election. Effect upon the Election. Quære. **Where the meeting for the election was left in charge of the town clerk for twenty or thirty minutes, while all the selectmen went to dinner, there being doubt whether, during that time, one person voted, and where during most of the meeting, but one of the selectmen actually officiated, it was questioned, whether the election in such town should not be declared void.**

WILLIAM W. WARREN *for petitioner.*
M. F. DICKINSON, Jr. *for sitting member.*

The Committee on Elections, to whom was committed the petition of Charles A. Perry of Shutesbury, claiming a seat in the house, as representative of the second Franklin district, being the seat now held by Albert Montague, have heard the evidence submitted to them by the petitioner, and by the sitting member, and the arguments of counsel on behalf of each, and they hereby submit their report.

The said representative district consists of the towns of Montague, Sunderland, Leverett, Wendell and Shutesbury.

No question was made, at the hearing, in regard to the votes of any of the towns, except that of Shutesbury. The aggregate of the votes in these towns (omitting Shutesbury) was: for Mr. Perry, 339; for Mr. Montague, 319. The vote of the town of Shutesbury, as counted by the town clerks of the district, was: for Mr. Perry, 34; for Mr. Montague, 55. If this count be correct, the whole vote of the district would be: for Mr. Perry, 373; for Mr. Montague, 374; thus electing Mr. Montague, by one ballot. And the questions presented, and argued before the committee, regarded the legality of the meeting and the correctness of the vote of Shutesbury.

The petitioner claimed that the meeting was illegally held, inasmuch as it was left, at one or more times, in charge of the town clerk, no selectman being present; that no proper counting of the ballots was made by the selectmen; that the ballots thrown, and the voting list, were not properly sealed up, and preserved as required by law; that no such transcript of the record as is required by law was made, signed and sealed, in open town meeting; and that the petitioner, Perry, actually received over forty ballots, instead of thirty-four, the number counted for him by the clerks, and upon which their certificate was based.

The respondent, Mr. Montague, claimed that no such illegality was shown, as would require the committee to declare the meeting void; that the failure to preserve the ballots and check-list, and the informality of the return to the clerks, were not sufficient omissions of legal requirements, to compel the committee to throw out the vote of the town; and that there was no competent testimony

before the committee, to warrant the inference that the vote of Shutesbury was other than as it was declared at the town meeting.

Although much testimony was introduced, there was really little conflict upon most of the material facts. That the selectmen all left the meeting in charge of the town clerk, while the former went to dinner, was conceded; the length of time they were absent was not agreed, but it was between "twenty minutes," and "afterwards of half an hour." The town clerk would not state whether votes were thrown during the time, but had the impression that none were thrown. Other testimony tended to show that at least one was thrown.

It was agreed, that the names checked on the voting list, were either checked by the chairman of the selectmen, or by the town clerk. The other two members of the board of selectmen appear not to have concerned themselves much, about the meeting, until the polls were closed. One testified that he was out of the hall much of the time, and was not certain that he was there more than one-sixth of the day. The junior member of the board, although in the hall, did not remain in the desk much of the time.

The testimony was also uniform, upon the facts that the ballots were left upon, or under, the desk, after the meeting adjourned, and were not sealed up, as required by law; and that the check-list was placed in the town safe, and the key left in the safe; also, that the return of the votes for representatives, was signed by the chairman of the board of selectmen only, in open town meeting.

The clerk and another member of the board signed it the next day, in the town of Leverett, on being informed, by a clerk of one of the towns of the district, that such signatures were wanting. The omission to sign at the meeting, appears to have been through inadvertence.

The return thus made conforms to the record of the meeting, and states the vote as 34 for Perry and 55 for Montague. Neither the record nor the return states the whole number of votes for representative; and although each of the selectmen and clerk testified, in regard to the counting of the ballots, it was not stated, by any of them, that the whole number of ballots thrown was ascertained. The check-list was produced by the chairman of the selectmen, and it appeared that the whole number of names checked, was 101, or 12 more than the number of votes given for both Perry and Montague; and all the witnesses agreed that the check-list had not been altered, since the meeting. There was testimony that ballots were given, for county officers, that had the names of the State officers torn off, but retained the names of the representatives; and some of the witnesses thought that there

were ballots for State officers alone, but how many, was not definitely stated. There was one ballot for two county officers, bearing the names of the candidates for register of deeds and county treasurer, and being the candidates whose names were borne on all the tickets for county officers; and yet, the record gave the whole vote, for these two men, as 86 and 92, respectively.

The town clerk did not count the ballots at all, but recorded them, as stated to him by the chairman of the selectmen. There was conflicting testimony, as to the mode in which the ballots were counted; whether the selectmen counted a part, and the numbers counted by each were added together, or whether one of the selectmen re-counted, after the other two, is left uncertain. Mr. Reed, one of the selectmen, testified that he counted over all the ballots for representative, after the other two, and the latter were standing, so that they might, and should, have followed the count, as made by Reed. Both the chairman and Reed testified that the vote as counted, was 55 for Montague, and 34 for Perry.

All the selectmen testified, that the tickets which were not scratched, were placed in a pile by themselves, after being once counted, and the number written down; and, in counting for the other officers, the number was taken, and the number for each officer, on the scratched tickets, added to it, without re-counting the number of straight tickets. There was a considerable number of scratched tickets, — not, however, for representatives.

The ballots bearing Perry's name, were quite different in appearance from those bearing the name of Montague, being wider and longer. The desk was midway, at one end of the hall, upon a raised platform; was five feet two inches high in front, about eight feet long, and closed at the end, but with an open space behind it, not railed off from the hall.

The top shelf of the desk was dropped about two inches below the top of the front, and there was another shelf underneath. The ballots were counted on the top shelf, there being no table behind the desk, and the clerk made his minutes on the same shelf. Some voters were standing in front of the desk, — one on a chair, — and could overlook the count. One witness testified that he watched the count, and counted 43 ballots, on which he saw Mr. Perry's name, and heard Mr. Reed say there were 18 in one pile, and 25 in another, for Perry. Another testified that he counted 48 of the broad ballots, four of them having the representative scratched or torn. Mr. Reed testified that, after the ballots were counted for all the officers, they were placed on the shelf, under the desk. Mr. Berry, the chairman, thought they were so placed. Mr. Ames, the other selectman, said that they were

left lying about, where they were counted. One witness, who was looking on, said that Mr. Reed, after counting the votes, placed ballots under the desk, and then took them, or a part of them, out, and counted them for other officers. Mr. Reed said that he placed under the desk, before the counting began, certain ballots which were lying on the top, and had not been used. It appeared that the ballot box was quite small, and had no cover whatever, but was open upon the desk throughout the day. Some of the Perry ballots were so long, that they required folding, before being placed in the box, as most of the witnesses agreed. There was no attempt at counting, before the close of the polls.

On the morning after the election, some of the voters of the town, among them, the two who testified to having counted the vote the preceding day, met together, and one of the party, having procured the key, went into the hall, and to the desk, where, as was testified, they found most of the ballots, lying on the top of the desk. Mr. Berry, the chairman of the selectmen, was the last to leave the hall, the night before, and did not lock the door; but Mr. Reed, who was the selectman in charge of the hall, had either gone himself, or sent some one, to lock the hall, and it did not appear that any one had been in the hall, after Mr. Berry left, unless Mr. Reed, or his man, had gone in, to see that the fires were safe.

It was in evidence, that one of the party of seven (the men who had seen Mr. Reed place the ballots under the desk), went at once to the desk, and took out from the corner, where he had seen the ballots placed, ten ballots, which had the appearance of having been folded and used, and which bore Mr. Perry's name.

The whole party of seven then proceeded to count the ballots, lying on the desk, bearing Mr. Perry's name, including the ten, and the number was found to be 44. They also found two votes, with the representative's name torn off, and one pasted.

They then set to work, to make a list of the voters in town, who were believed to have voted for Perry, and, dividing the town into districts, proceeded to get the signatures of the voters, to a declaration that they had so voted. When this was completed, and communicated to Perry, he gave notice to Mr. Montague, of his intention to contest the seat; gave notice to the clerk, that he claimed a recount of the vote, and further notified Mr. Montague, and the selectmen, that he desired to take testimony, at a time and place named, to prove that there was fraud, or mistake, in the record and return of the vote of Shutesbury, and requested Mr. Montague and the selectmen to be present, and examine the wit-

nesses, if they desired. Neither of the parties notified, attended, but Mr. Perry proceeded to take the testimony. Forty voters deposed that they had voted for Mr. Perry; and, before the committee, two others testified that they so voted. One of the witnesses also deposed that Mr. Crandall, the town clerk, tried to influence him to vote against Mr. Perry. Mr. Crandall admitted that he said something to the witness, but that it was a message, that he had been requested to deliver.

It was objected, on the part of the sitting member, that this kind of testimony was not competent, and the case of *French* v. *Bacon* (*ante*, p. 184), was cited for the committee. But that was a case of *ex parte* affidavits, and in that case the committee received the testimony, but did not consider that its weight was sufficient to overcome the evidence of a record, when the whole number of ballots tallied with the number recorded for the several candidates, and when the ballots and check-list had been preserved, according to law. In the present case, the testimony was taken, after full notice to the other side, and with all the opportunity to cross-examine, which could have been given, if the testimony had been taken before a commissioner, appointed by the committee. The failure of any party interested, to appear and cross-examine, seems significant, inasmuch as the magistrate, who took the testimony, and others who were present, testified that the whole proceeding was conducted in a public, and entirely proper manner, in the centre of Shutesbury.

An attempt was made, to discredit the testimony of some of the forty witnesses, by impeaching their reputation for truth and veracity.

The committee do not deem it necessary to pass upon the weight of the testimony on this point. for the reason, that of the ten witnesses who were thus attacked, nine were checked as having voted, and the committee cannot doubt that they all voted, for Mr. Perry. Indeed, no one seemed to question that fact seriously. The tenth, however, was not checked; and there was testimony, to the effect that he said, after the meeting, that he had not voted. The names of the other witnesses, so voting for Perry, were also all checked, and it was in evidence, that neither Mr. Perry, nor any of his friends, had access to the voting list, from the time of election, until it was produced at the hearing before the committee. There was no attempt to contradict or control the testimony of the other thirty-two witnesses, who swore they voted for Perry.

Having stated, thus fully, the purport of the evidence in the case, it remains only to give the conclusions of the committee.

We have not felt bound to pass upon the question, whether the

desertion of the meeting, by the officers, whose duty it was to preside over it, is sufficient, of itself, to render the meeting invalid. If it were necessary to pass upon that question, however, all will appreciate how dangerous it would be, to decide that an election, so conducted, should stand. If the ballot box can be left in the charge of an irresponsible person, in a small town, with or without proof of improper conduct on his part, and the election go unchallenged, and be sanctioned by the house of representatives, it is difficult to say what amount of negligence might not be tolerated, in a large city. It seems, at all events, very like a farce, for this house to aid in enacting laws, to secure the purity of the ballot box, and yet admit to membership, persons elected in open violation of those laws.

But we rest our decision of this case upon a different ground. We find the record of the town to be defective, in not stating the whole number of ballots given for any officer. We find a discrepancy between the ballots recorded, and the number checked; and we find the only proper evidence to ascertain the truth, viz.; — the ballots actually cast, are not preserved, so that the committee are left to resort to suppositions of their own, for an explanation on this point. We also find that the town clerks of the district did not have such evidence of the vote of Shutesbury as the statute required they should have; and, although it may be said, that there was a free and uninterrupted expression of the will of the people of Shutesbury, at said meeting, still, the undersigned, a majority of your committee, feel that, in view of the irregularities, and the shameful disregard of law shown in the conducting of the meeting, taken together with the discrepancies in the record, and the conflicting testimony of the voters of the town, as to the number of votes cast for representative, it is exceedingly doubtful and uncertain what that expression was. Therefore, we report the election of representative, held in the town of Shutesbury, on the 4th of November last, void for uncertainty, and that Albert Montague is not entitled to a seat in this house, as member; but, that Charles A. Perry, having received a plurality of all the ballots that can be ascertained to have been cast in the district, is the member elect from the second Franklin district, and entitled to the seat now occupied by Albert Montague.

Messrs. Billings and Hurlbut submitted the following Minority Report: —

The undersigned, members of the house committee on elections, dissent from the report of the majority of that committee, and call attention to the following facts:

The official returns of the five towns of the district, gave Albert Montague, the sitting member, 374 votes, and Charles A. Perry, the contestant, 373.

The return of Shutesbury was: Montague, 54; Perry, 34.

The petitioner demands the seat, on two grounds: first, illegalities in the conduct of the election and making of returns; second, on an alleged error in the count. He claims 43 votes in Shutesbury, instead of 34.

The committee were unanimously of the opinion, that the meeting was legally called, and that no fraud was shown in the case.

At the hearings it appeared, that some one or more of the selectmen was present constantly, while the balloting was going on, with the exception of a short period of from twenty minutes to half an hour, at noon, when they went to dinner. During that time, the ballot box was in the custody of Mr. Crandall, the town clerk. There was conflicting testimony as to whether one, John Pratt, voted during that time. It was not claimed that any other vote was thrown, while the selectmen were gone. Mr. Berry was present all the time, except while thus out at dinner, and his associates, Jabez W. Reed and Warren Ames, were each present, at various times, for longer or shorter periods, through the day. All were there, at the close of the polls, and participated in making the count. The town clerk was at his post all day, except during a brief interval, when he went to dinner, after the return of the selectmen, and he remained until after the meeting adjourned. The check-list contains 101 checks, all made by Mr. Berry or Mr. Crandall, and they say no person voted, whose name was not checked, and the name of every man who did vote was checked.

The voting took place at a table or desk, seven or eight feet long, standing upon a platform, on one side of the room, raised two steps from the floor, so that the top of the desk, in front, was about five feet above the floor. Under the table was a shelf. The votes were all kept in the ballot box, until the voting was over. The count of votes occupied about half an hour, and there is no conflict of testimony, as to the manner in which it was conducted. Mr. Berry, chairman of the board, says, "We tried to sort them first, — the democratic and republican, — but they were so much pasted, and scratched so much, that we took the name of each candidate and counted separately, thus counting as many times as there were officers to be voted for." In each case, each of the selectmen counted a portion, and the three results were added; *but the representative vote was further verified*, by Mr. Reed counting it again, while the other selectmen stood on either side of him, observing him, and Mr. Berry followed the count, while Mr. Reed made it, and both gentle-

men say the vote was, as called off by Mr. Berry to the town clerk, 55 for Montague, and 34 for Perry, and that all the selectmen agreed on the count. Mr. Ames, the other selectman, says he supposed, at the time, that the count was correct; though he now thinks there must have been a mistake, because more than 34 men now make affidavits that they voted for Perry. Mr. Berry and Mr. Reed still say that they are sure the count was correct, and are positive that there was no mistake.

A number of persons were in the hall, while the vote was being counted, most of them friends of Mr. Perry. Several of these latter were watching the count; one of them, F. H. Leonard, standing upon a chair for that purpose. He says he saw more than 43 Perry ballots taken from the box, but his testimony is loose, vague aad somewhat contradictory, and more conjecture than fact. Thus, he testifies, in one place: —

"Q. Whether or not you counted, at the time the selectmen counted the ballots, the number which had been cast for Mr. Perry?

"A. I did. The number of wide ballots, as they were taken out of the ballot box, was 48, and they had Mr. Perry's name on them There were two with Mr. Perry's name pasted on them."

And in another place he testifies: —

"Q. Did you consider, at the conclusion of the election, that Perry's name was on forty of the ballots, from the size of the ballots?

"*A. From the size of the ballots.*"

The last answer shows, conclusively, that the witness was testifying to an inference, not to a fact. Besides, he elsewhere says, that the chair he stood on was three or four feet from the desk, and other persons stood between him and the selectmen. It is also a suggestive fact that Mr. Leonard made no objection to the count, as it was read to the clerk, and announced in open town meeting, by the chairman of the board, nor did any friend of Mr. Perry, several of whom were present, intimate that there was any error, or make any comments upon the matter.

The certificates were made up, and signed by the proper officers, in open town meeting, though, by an accident, as all agree, only Mr. Berry, of the selectmen, signed the certificate of the representative vote that night. Mr. Reed added his name, the following day, at the meeting of the town clerks of the district, in North Leverett.

The check-list was placed in the town safe, in the town hall, by Mr. Berry that evening, and the safe was afterwards locked by Mr. Reed, who did not know the list was there. After the count,

the votes were laid by Mr. Reed on the shelf under the desk, and near to them, on the same shelf, were other ballots, which had not been cast at the election, but which were put there to get them out of the way.

The next forenoon seven friends of Mr. Perry, none of them town officers, procured the key of the town hall from Mr. Reed's house during his absence, (he having charge of the building), and went in, to make an examination of the ballots. Two of these men state that they found thirty-four Perry ballots scattered about on the table, and ten more on the shelf underneath; in all, forty-four, for Perry. Another says they found forty-three Perry votes. In making up this result, they were obliged to select those ballots which, *in their opinion*, had been voted, from other ballots not voted, which were lying on the shelf and scattered around. The witnesses claimed to be able to distinguish the two kinds, from the alleged fact, that the ballots voted had been folded. Mr. Leonard says: "We found other ballots *on the table*, which had not been voted," and this he infers, because, as he says, "they had not been folded."

It is a remarkable fact, that this self-constituted committee did not take the precaution to preserve the ballots they found for Perry, though Mr. Leonard says he carried away three or four of them, and still has them at home, and he don't know how many were taken away, in all. Again, Mr. Leonard says, "*the committee* (of seven) *didn't count any but votes with Perry's name on.*" Rather weak testimony upon which to contradict the sworn return of the selectmen, especially when one of them, Mr. Berry, says: "Some of the votes were folded and some were not;" and Mr. Reed says, "a good portion went in open."

The Perry party then procured the affidavits of about forty men, that they voted for Mr. Perry at the election, and these affidavits were submitted to the committee. The name of one of the persons, thus certifying, is not checked upon the check-list, and two of the selectmen say, that he not only did not vote, but told them after town meeting that he did not vote, though he supposed Perry thought he did; and that he showed them a Perry vote, which he said had been given him to throw, but which he did not use. Mr. Crandall confirms the testimony that this man, Phelps, did not vote. As to some ten or a dozen of the persons making the affidavits, the contestant introduced the evidence of several of the best citizens of Shutesbury, and one man from Leverett, that their reputation for truth and veracity, in the community where they live, is bad, and this testimony was strengthened by the reluctance

which two, at least, of the petitioner's witnesses showed, in testifying upon the same point in cross-examination.

From all that appeared to the committee, we are unable to find any evidence that the election, in the town of Shutesbury, was not conducted fairly, and that the return did not express the actual vote for each and every officer balloted for. The selectmen and town clerk all say, everything was done fairly and honestly, and that no mistake was made. And Mr. Ames bases his present supposition, that there must have been a mistake, solely on the fact, as he says, that they found (by the affidavits) that more than thirty-four persons voted for Perry. But this belief of Mr. Ames is rebutted by the denial of both his associates, whom he, and all, concede to be perfectly honest men, and by the fact that no objection to the result was suggested, when the vote was counted and declared, though several of Perry's friends stood by and watched the handling and counting of the votes and all the proceedings.

Much stress is laid upon the fact that the total vote returned for representative was only eighty-nine, while the total number of names checked was one hundred and one. But we are persuaded that such a state of things is nothing unusual. The testimony was, that some voted only the State ticket; others tore off the State ticket entirely; one vote was cast for two county officers alone; and, altogether, there was a considerable number of split and partial tickets. Mr. Berry says, some votes were thrown without representative's name on them, and E. L. Johnson, one of Perry's witnesses, testifies thus on this point: —

"Q. *Did you find any ballots that did not have any name for representative on them?*

"A. *I think there were several, on which neither Mr. Perry's nor Mr. Montague's name appeared, and there were one or two which was pasted over, but I cannot state that exactly.*"

Mr. Ames, Mr. Perry's friend, upon the board of selectmen, also says, there were about "half a dozen" such. Now, if Mr. Montague had fifty-five votes (which is not disputed), and Mr. Perry forty-four, as claimed, it is impossible to see how, out of a total of one hundred and one votes, there could have been "several" or "half a dozen" votes bearing neither Montague's nor Perry's name. We have no doubt that a comparison of the check-lists and returns of other towns, and wards in cities, would show a similar discrepancy, and, on this point, we confidently appeal to the experience of those members of the house, who have served as town or ward officers, and have made similar returns.

The question for the house is, whether the election was fairly and honestly conducted, and whether the voters of Shutesbury have been credited with their correct vote. The burden of proof is upon the petitioner, and he has not sustained it. The evidence he relies upon falls far short of proof. The return of town officers is not to be lightly treated, nor dismissed upon mere affidavits, especially where there is such doubt thrown upon the reputation of many of the witnesses for truth and veracity. The law contemplates but one way of deciding elections, and that is by ballots, not affidavits. To reverse the rule, opens the door to endless mischief, and establishes a precedent which this house has always refused to entertain. We call especial attention, in this connection, to the case of *French* v. *Bacon*, decided last year (*ante*, p. 184), where the Committee on Elections expressly refused to act upon affidavits, introduced for a similar purpose.

In regard to the alleged illegalities in conducting the election and making the returns, we have to say, that the provisions of the statute which covers such matters are *directory*, and omission or errors, in regard to such provisions, have not been held to vitiate an election, except in extreme cases. Cushing's Law and Pr. of Legis. Assem., p. 74; *Malary* v. *Merrill*, Clarke & Hall, 328; *Van Rensselaer* v. *Van Allen*, Clarke & Hall, 73; *Arnold* v. *Lea*, Clarke & Hall, 601; *Standish*, Mass. Election Cases, Cushing, S. & J., 82; *Colchester*, Peckwell, I., 503, 506, 507; *Hope*, Mass. Election Cases, Cushing, S. & J., 71.

We, therefore, recommend that the petitioner have leave to withdraw.

[Upon the presentation of the reports, a motion was made to substitute the minority report for that of the majority, and pending that question, the minority report was amended, by a vote of 121 to 74, by adding thereto the words, "And that the seat now occupied by Albert Montague of Sunderland is hereby declared vacant." The motion to substitute the minority report, as amended, was then carried by a vote of 126 to 60. The report as amended was then accepted, thus giving the petitioner leave to withdraw, and vacating the seat held by Mr. Montague. (H. J. 1874, p. 117.) A new election was ordered. (H. J. 1874, p. 127.) Mr. Montague was elected to fill the vacancy. The editors do not regard this case as being without value as a precedent. The views of the minority of the Committee on Elections are given, because the house apparently adopted those views, and by the same vote unseated the member in whose behalf those views were given. The value of the precedent is impaired because it is impossible to know upon what ground the

house based its vote. However, it must have decided that, for the irregularities in Shutesbury, the election was void. By the journal of the house it is plain that the case was an exciting one, and the fact that the contesting party, in his own town, had fallen largely behind his opponent, making it tolerably certain what would be the result of a new election, may have had much to do with the action of the house.]

JOHN I. MONROE *v.* JOHN CUMMINGS.

House Document, No. 93. February 25, 1874. Report by Messrs. JUDD, BILLINGS, HURLBUT, MERRITT and SEYMOUR; the minority report by Messrs. BONNER and HOLLIS.

Recount of Votes. Where two-thirds of the votes cast for representative in a town meeting were counted by the clerk alone, during the time when the meeting, attended by 1,000 citizens, was engaged in an angry contest over the question of striking the clerk's name from the jury-list, and so great confusion and disturbance existed that the moderator lost control of the meeting, and finally declared it dissolved before the question could be settled, — it was *held* by a majority of the committee (a minority dissenting), that the votes should not be recounted, — but the house, accepting the minority report, ordered the committee to recount the votes.

The committee having recounted the votes, pursuant to the order of the house, found and reported that the original count was correct.

The Committee on Elections, to whom was referred the petition of John I. Monroe, contestant for the seat now occupied by John Cummings, from the twenty-second Middlesex district, asking that the votes of said district be recounted, reported that the petitioner have leave to withdraw.

Messrs. BONNER and HOLLIS, submitted the following minority report: —

The undersigned, members of the Committee on Elections to whom was referred the petition of John I. Monroe, contestant for the seat now occupied by John Cummings, of the twenty-second Middlesex district, would respectfully ask permission to present to the house, their reasons for dissenting from the report of the committee.

At the hearing before them, it appeared that, at the election in Woburn, in November last, held for the choice of state officers, a town meeting was held, for the transaction of town business, at the same time and place.

That there were great confusion and disturbance, during said meetings, growing out of an angry and uproarious contest over a proposed revision of the jury-list.

That there were present at least one thousand citizens, engaged in this fierce contest, during the entire time the ballots for representatives were being counted.

That, in this contention over the proposed revision of the jury-list, the house was polled several times, and twice by the same check-list used in the election of state officers.

That 695 of the ballots cast for representatives were counted by Mr. E. E Thompson, clerk of the board of selectmen, and that no one else verified his count.

That, while Mr. Thompson was counting these ballots, the people were vehemently debating a proposition to strike from the jury-list the name of this very Mr. Thompson.

That motions, resolves and amendments, were offered so frequently and irregularly, and the meeting became so boisterous, that the experienced moderator lost all control of it, and, amid utter confusion, declared it dissolved, and left the hall, without any vote authorizing such dissolution.

That, notwithstanding this long discussion of the jury-list, and the many votes regarding it, no list was adopted, revised, or accepted.

That Mr. Monroe was the candidate of the liberal republicans and democrats, and that ticket received a majority of 94 votes, in a total of 1,033.

That the vote, as declared, was for Mr. Cummings, 524; and for Mr. Monroe, 508.

We are of the opinion that no person, situated as Mr. Thompson was, viz., being clerk of the board of selectmen, and one of the prominent parties engaged in making up the jury-list, having allowed his name to be presented on the list for approval, and hearing the uproarious contest, over the proposition to strike his name, with others, from the list, could have counted the ballots, during this fierce contest, correctly.

We would therefore recommend that the petition be recommitted, with instructions to recount the votes as prayed for.

[Upon the presentation of the reports, a motion to amend, as recommended by the minority of the committee, was carried, and the petition was recommitted to the committee, with instructions to recount the votes. (H. J., 1874, p. 205.) The committee recounted the votes for representative, and reported that their recount corresponded exactly with the count and return of the town

officers, and that the sitting member was entitled to the seat. The report is House Document, No. 109. The report of the committee was accepted. (H J., 1874, p. 229.) The report of the minority of the committee, upon the question of recounting the votes, their views having apparently been adopted by the house, is published by the editors as a valuable precedent.]

SENATE — 1875.

Special Committee on Returns of Votes for Senators. Hon. WASHINGTON TUFTS, Hon. HENRY S. HYDE, Hon. HENRY SMITH, Hon. THOMAS INGALLS, and Hon. EUSTICE C. FITZ.

A. E. THOMPSON *v.* RICHARD BRITTON.

Senate Documemt, No. 15. January 21, 1875. Report by Mr. HYDE.

[In this case, the special committee, to whom was referred the petition of A. E. Thompson of Woburn for the seat occupied by Richard Britton, from the sixth Middlesex district, reported that the sitting member was not eligible to the office of senator, because the naturalization of his father at the Lynn Police Court in 1852, upon which the sitting member depended for his citizenship was not, in the opinion of the committee, legal; and the committee reported a resolve that the seat be declared vacant. A substitute for the resolve was adopted, that the petitioner have leave to withdraw, by a vote of 18 yeas to 12 nays. (S. J. 1875, p. 53.) Subsequently, a motion was made to reconsider the vote by which the substitute was adopted. The motion was lost, by a vote of 12 yeas to 20 nays. (S. J. 1875, p. 56.) Sufficient facts are not stated, or accessible to the editors to make the case of value as a precedent. *Patrick A. Collins* appeared for the petitioner, and *Charles Robinson, Jr.*, for the sitting member.]

HOUSE—COMMITTEE ON ELECTIONS, 1875.

Messrs. ABRAHAM B. COFFIN of Winchester, *Chairman;* EDWARD F. SMITH of Dudley, JOHN S. RYDER of Rochester, NATHAN M. WOOD of Swansea, GEORGE M. WARREN of Wrentham, EMERSON GEER of West Springfield, and ALBERT E. RICE of Barre.

JAMES McMANUS *v.* JOHN B. FAIRBANKS.

House Document, No. 14. January 23, 1875. Report by A. B. COFFIN, *Chairman.*

Recount of Votes refused. The facts that a person, who was not an election officer, counted the votes, after they had been counted by one of the selectmen, — the others being present at the polls, and the result of the count being the same, — and that the petitioner received less votes than other candidates of his party for other offices upon the same ticket, are not sufficient grounds for a recount of votes by the house of representatives.

The Committee on Elections, to whom was referred the petition of James McManus, democratic candidate for representative from the thirteenth Middlesex district, for a recount of the ballots cast at the election, Nov. 3, 1874, for representative from said district, having heard the statements of the petitioner, and of the sitting member from said district, and the evidence offered by each, report that the town of Natick constitutes said district. The petitioner, at the hearing, gave as reasons for asking a recount, that a Mr. Mason, who was not one of the selectmen of Natick, assisted in counting the ballots at said election, and that the returns showed that the democratic candidates for other offices received more votes than the petitioner. It appeared in evidence, that all the selectmen were present at the polls at said election; that one of them counted all the ballots, and that all the ballots were again counted by Mr. Mason. The result of the count was the same. The committee are satisfied that the ballots were carefully counted. The house sustained an election, where the Committee on Elections reported (*Arnold* v. *Champney*, *ante*, p. 121), that nearly four-fifths of the ballots were not counted by the selectmen, but were counted only by persons called to assist in counting. The other reason given by the petitioner, namely, that he received less votes than other candidates of the same party, for other offices on the same ballot, is of such frequent occurrence, as to raise no presumption, in the

minds of the committee, that a mistake was made in the count. William Nutt, chairman of the board of selectmen, testified that he saw, put in the ballot-box, quite a number of ballots, with the vote for representative torn off.

Your committee, therefore, recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1875, p. 71.]

THOMAS R. GREENE *v.* WILLIAM E. BRIDGMAN.

House Document, No. 35. January 29, 1875. Report by A. B. COFFIN, *Chairman.*

Recount of Votes refused. The fact that the sitting member was returned, with a plurality of only five votes, and that the petitioner claimed that one of the votes cast was illegal, and that there were rumors of other errors, which he could not trace to any reliable source, — no evidence being introduced and no claim of fraud made, — will not justify a recount by the house of representatives.

The Committee on Elections, to whom was referred the petition of Thomas R. Greene for a recount of ballots, cast for representative in the fifth Hampshire representative district, submit the following report:

The petitioner, and the sitting member, William E. Bridgman, appeared before the committee. It was admitted that, by the returns of the votes for representative in said district, said Bridgman had a plurality of but five votes.

The petitioner claimed that he had positive information, that one ballot, bearing the name of Calvin Bridgman, was counted for the sitting member, and that there were rumors of other errors, which, however, he had not been able to trace to any reliable source. Mr. Bridgman stated, that he had no knowledge that there was an error, even of one vote. The petitioner introduced no evidence, as to the error alleged, in counting this single ballot, and stated that he had no testimony to present, in proof of any other errors, and that he did not charge any fraud in the count or returns.

Even admitting a mistake in counting one ballot erroneously for Mr. Bridgman, he would still have a plurality of four votes, pre-

cisely the same number as in the case of *Burt* v. *Babbitt*, *ante*, p. 174. In this case the house seems to have adopted, as a precedent, that the mere fact of a close vote is not sufficient reason for making a recount.

Your committee therefore report that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1875, p. 85.]

SALMON D. HOOD *v.* JOHN H. POTTER.

House Document, No. 38. February 1, 1875. Report by A. B. COFFIN, *Chairman.*

Mistake in Name of Candidate. It is a well-established practice in this Commonwealth, in an election controversy, where there has been an omission or mistake in the name, or in spelling the name of a candidate on the ballots, upon proof of the identity of the person for whom the ballots were intended, as by evidence of his residence, profession or occupation, by the fact that he was known to be a candidate, and no other person, to whom the name could be applied, was eligible; that the ballots were printed and intended to be printed for him, or similar facts tending to show for whom the ballots were intended, that such ballots will be counted for such person.

Same. Evidence of Voter. A voter, however, will not be allowed to testify directly for what person he intended his vote to be cast.

Same. Evidence. Votes cast in Saugus for *Solomon* D. Hood of Topsfield, were counted for Salmon D. Hood of Topsfield, upon proof that the latter was the regular candidate of his party; that several of the voters of Saugus understood, from a party canvassing for Hood, that his name was Solomon, and the name was so reported to the printer of the ballots, who so printed it upon two forms of ballots, which were used at the polls until the mistake was discovered; that there was no other voter in Topsfield named Hood, beside the petitioner, and that the petitioner had several times received and answered letters addressed to him as Solomon D. Hood.

Evidence. Depositions, when not received. Depositions of voters, taken without proper notice to the opposite party of the time and place of taking them, or waiver of notice upon his part, are inadmissible, in the hearing upon a controverted election, unless taken by a commission appointed under an order of the house.

RUSSELL H. CONWELL *for petitioner.*
STEPHEN B. IVES *for sitting member.*

The Committee on Elections, to whom was referred the petition of Salmon D. Hood of Topsfield, claiming the seat now occupied by John H. Potter, as representative, from the twentieth Essex repre-

sentative district, having heard and considered the evidence offered, and the arguments of the respective counsel, submit the following report: —

The petitioner, in his petition, claims that he received 399 votes, and that John H. Potter, the sitting member, received but 356 votes.

The returns of the vote for representative, from the four towns composing said district, — namely, Saugus, Topsfield, Middleton and Lynnfield, — were admitted to be correct, and were as follows: —

SAUGUS. —	Salmon D. Hood of Topsfield,	204
	Solomon D. Hood of Topsfield,	80
	John H. Potter of Topsfield,	162
TOPSFIELD. —	Salmon D. Hood of Topsfield,	62
	John H. Potter of Topsfield,	82
MIDDLETON. —	S. D. Hood of Topsfield,	28
	John H. Potter of Topsfield,	51
LYNNFIELD. —	Salmon D. Hood of Topsfield,	25
	John H. Potter of Topsfield,	61

The question presented is, whether the 80 votes, cast in Saugus, bearing the name *Solomon* D. Hood, ought to be counted for the petitioner. If they are so counted, it will be seen by the returns, that he will then have, in all, 399 votes, — the number claimed for him in the petition, — and 43 votes more than were cast for the sitting member.

If it shall clearly appear, from legal evidence, that the electors intended these 80 votes for the petitioner, they should be counted for him, — otherwise, not. This principle has been so often and generally applied, that no authorities need be cited in support of it.

By a well-established practice, in this Commonwealth, in cases where there has been an omission or a mistake, in the name, or in spelling the name, of the candidate on the ballots, the identity of the person for whom the ballots were intended, may be proved in various ways; as, by his place of residence, his profession or occupation; by the fact that he was known to be a candidate, and that there is no other person eligible, to whom the name can be applied; by showing that the ballots were printed, and intended to be printed, for him. If, by these, or similar facts, tending to show for whom the ballots were meant and intended, the identity of the individual voted for can be clearly established, such ballots are to be counted for him, to the end that the will of the electors shall

prevail. This practice has been adopted, in the following cases, which have arisen in the house of representatives, in this State:— *James Pratt, Jr.*, Mass. Cont. Elections, Cushing, S. & J., 236; *Cogswell* v. *McNeil*, *ante*, p. 108; *Chapin* v. *Snow*, *ante*, p. 96; *Wright* v. *Hooper*, *ante*, p. 100; *Arnold* v. *Champney*, *ante*, p. 121; *Hobbs* v. *Bartholmesz*, *ante*, p. 182.

It was shown by the testimony before the committee, that the petitioner had been, for three years, one of the selectmen of Topsfield; that he was an auctioneer, and had been one of the assessors; that a resident of Topsfield, who was favorable to the petitioner, went to Saugus before the election, and informed several voters there, that it was proposed to vote for Salmon D. Hood of Topsfield for representative, describing him by his occupation and the town offices he had held. Two of these voters in Saugus, and who were active in the canvass, understood from this informant, that the full name of the proposed candidate was *Solomon* D. Hood,—one of whom so wrote the name at the time, the memorandum of which was produced before the committee. The name of the candidate was so reported to the person in Saugus who had the ballots printed. The votes for representative were on the general ballot for State and county officers. The latter person, above mentioned, had two forms of ballots printed, each bearing the name, *Solomon* D. Hood. There was a third form of ballot distributed and cast in Saugus, having thereon the petitioner's true name. The polls were opened at one o'clock. The fact of the difference in the two names was not noticed until about half-past two o'clock. When it was discovered, resort was had to an autograph letter, addressed by the petitioner to the citizens of Saugus, for the purpose of learning which name was correct. This letter was signed Salmon D. Hood. Thereupon, ballots were altered in pencil and by pasting. The ballots cast for representative in Saugus were produced before the committee. Several were found to have the name Salmon D. Hood, in print, pasted over that of Mr. Potter; and one, at least, with the first name, *Solomon*, erased, and the name Salmon, written in pencil instead.

It was in evidence that the petitioner was born, and had always resided, in Topsfield; that, at the time of the election, there was no other voter in Topsfield, by the name of Hood, except the petitioner, and had been none for four years past; that the petitioner had several times received and answered letters, addressed to him as Solomon D. Hood.

The petitioner was nominated in Topsfield, and not by a convention of the towns in the district.

Four, and only four, of those who voted *Solomon* D. Hood, ap-

peared before the committee, and testified that they were personally acquainted with the petitioner, or knew him by reputation. The depositions of thirty-nine other voters in Saugus were offered, in which, as was stated before the committee, the deponents alleged that they cast ballots having the name thereon, *Solomon* D. Hood, by which name they meant the petitioner. This testimony was rejected. Depositions would seem to be inadmissible in such cases, unless the opposite party interested has proper notice of the time and place of taking them, or waives such notice, or they are taken by a commission appointed under an order of the house. *New Marlborough*, Mass. Cont. Elections, Cushing, S. & J., 323; *Rehoboth*, *Ib.*, 48; *Ashfield*, *Ib.*, 583.

Furthermore, these depositions were inadmissible, on the ground that, in controverted elections in this State, the practice has been, not to allow electors to testify directly for what person their ballots were intended to be cast.

The counsel for the sitting member, claimed that there was no evidence before the committee of the intention of those who cast said eighty votes, with the four exceptions above named.

But under the practice referred to, the intention may be gathered from the facts proven. In the above named case of *Arnold* v. *Champney*, the committee, in their report, say, that "no evidence was presented to your committee, tending to show by what persons any of these eight ballots (being the ones in dispute) were cast, or what the intentions of the persons casting them were." Yet the house held, from all the facts presented in the case, that the votes were intended for Mr. Champney, and so decided.

From all the evidence before them, your committee are unanimously of the opinion, that these eighty votes were intended for Salmon D. Hood, the petitioner, and should be counted for him.

The error in the name was not so great as in some of the cases above cited. It might easily occur from a similarity in the sound of the two names. In the above case, of *Joseph T. Wright* of Marblehead, there were allowed and counted for him two hundred and fifty-three ballots, cast in ward 5, Salem, bearing the name *Thomas* T. Wright. The facts in that case were very similar to those in the one now under consideration.

The committee desire to express their appreciation of the honorable conduct of the sitting member, in this matter; but, in view of the evidence, and the precedents bearing on the case, they unanimously report the accompanying resolution.

[The resolution declared that the petitioner was entitled to the seat. The report was accepted, and the resolution adopted. H. J., 1875, pp. 87, 91.]

FREDERICK P. SHAW *v.* JOSEPH BUCKMINSTER.

House Document No. 46. February 8, 1875. Report by A. B. COFFIN, *Chairman.*

Second Election, when void. If an election is reported as resulting in a tie, and a second election is held, as provided by the Constitution, in cases where there has been a failure to elect, the house will, upon petition, inquire into the first election, and upon proof that, at such election, the petitioner received a plurality of the votes, the second election will be declared invalid, and the seat given to the petitioner.

Mistake in the Name of Candidate. A ballot, upon which the printed names of the two regular candidates of the party were erased by pencil, and the words "*fredrc p. Shaw*" were found by the committee, upon inspection, to be written in pencil along the side of the ballot, some of the letters being somewhat indistinct, will be counted for Frederick P. Shaw, upon proof that he was a candidate at the election, and that no other person, by name of Frederick Shaw, lived in the city, although there was a person there named Franklin Shaw.

Erasure of Name on Ballot. Where pencil lines, although not very dark, are drawn over the whole surname of a candidate, upon the ballot, leaving the rest of the name unmarked, the ballot cannot be counted for such candidate.

E. L. BARNEY *for petitioner.*

THOMAS M. STETSON *for sitting member.*

The Committee on Elections, to whom was referred the petition of Frederick P. Shaw, claiming the seat now occupied by Joseph Buckminster, as representative, from the tenth Bristol district, have heard the parties, their evidence, and the arguments of the respective counsel, and, having considered the same, submit the following report: The tenth Bristol district is composed of wards 1, 2 and 3, in the city of New Bedford, and is entitled to two representatives.

The mayor and aldermen of New Bedford transmitted a certificate, dated Nov. 4, 1874, to the Secretary of the Commonwealth, that, at the election held the 3d day of said November, said district did elect Charles M. Peirce, Jr., of New Bedford, representative, and that Frederick P. Shaw of New Bedford had 795 votes, and Joseph Buckminster of New Bedford had 795 votes.

It was admitted, that the petitioner and said Joseph Buckminster both reside in said ward 2, and that the latter gentleman now occupies his seat in this house, under a second election, held in said district, the fourth Monday of November last, at which second election he received 189 votes for representative, being all the ballots cast; and that the petitioner and his friends took no part in said second election.

The second election was held under the last clause in the fifteenth article of amendments to the Constitution of Massachusetts, which is as follows: "But in case of a failure to elect representatives, on that day (the Tuesday next after the first Monday in November), a second meeting shall be holden, for that purpose, on the fourth Monday of the same month of November."

It therefore becomes necessary to decide whether there was a failure to elect, at the election of November 3d; for, unless there was such failure, the second election would be clearly invalid.

The returns made by the ward officers, of the ballots cast in said district, for representatives, at the election of November 3d, were as follows: —

Charles M. Peirce, Jr., had	827	votes.
Frederick P. Shaw had	795	"
Thomas H. Soule had	770	"
Joseph Buckminster had	795	"
Ivory S. Cornish had	9	"
Frederick Shaw had	1	vote.
Isaac Sawtelle had	1	"
L. G. Hewens had	1	"

A petition was duly presented, to the mayor and aldermen of New Bedford, requesting a recount of said ballots. The mayor and aldermen recounted the ballots, and signed a certificate, dated Nov. 5, 1874, setting forth the result, which corresponds precisely with the count and returns of the ward officers. This certificate was signed, by said Joseph Buckminster, as one of said aldermen.

The petitioner, at the hearing, claimed that the ballot returned, as cast for Frederick Shaw, ought to have been counted for the petitioner, and that he was duly elected, at said first election, by a plurality of one vote.

The petitioner called the city clerk of New Bedford, who testified, that he had resided in that city over fifty years; that he had never known any person, in New Bedford, by the name of Frederick Shaw; that he had examined the list of voters, and the assessors' list, in said wards, for four years past, and that he did not find, upon either of said lists, the name Frederick Shaw.

The sitting member, Mr. Buckminster, testified that he had lived in said district, eleven years, and had been five times elected as one of the aldermen of said city, and that he was not aware that he had ever heard of a person, in New Bedford, by the name of Frederick Shaw.

It was claimed, by the sitting member, and by his counsel, that it was impossible to read the first name, on the ballot returned for

Frederick Shaw; and, furthermore, that if this vote should be allowed for the petitioner, another vote, bearing the name Joseph Buckminster, — which was thrown out, on account of pencil-marks, over the word Buckminster, — should be counted for the sitting member, and thereby, a tie would still remain.

It was claimed, by the sitting member, and admitted by the petitioner, that there was a resident, in said district, by the name of Franklin Shaw.

The petitioner, the city clerk, and two other aldermen, of New Bedford, testified that they had seen the ballot, bearing the name of Frederick Shaw, and stated, in substance, that it was very difficult, if not impossible, to tell what the first name was, or whether it was Franklin or Frederick. The erasure of the name Buckminster, on the other ballot in question, was described, by some of these witnesses, as a light scrawl of a pencil.

At the close of the hearing, the committee expressed a desire to inspect the two ballots in dispute. Both Mr. Shaw and Mr. Buckminster, stated their willingness, or desire, to have the ballots produced. Subsequently, the ballots were brought before the committee, and the two claimed to be doubtful were identified by the city clerk, and by one of the aldermen, who assisted in the recount, above mentioned.

Tle committee are of the opinion, that the last name on the ballot. claimed for Joseph Buckminster, was undoubtedly erased; the pencil lines over it are not very dark, but they cover the whole word. They unanimously agree, that this ballot was rightly rejected.

The committee have inspected the other ballot in question, with great care. The bottom of the printed part of this ballot, is as follows: —

"*For Representatives to the General Court, 10th Bristol District:*
THOMAS H. SOULE,
JOSEPH BUCKMINSTER."

It should be observed, that the vote for representatives was on the general ballot, for state and county offices, and that the residence of the candidates for representatives, does not appear on the ballots.

On the ballot now referred to, the names, Thomas H. Soule and Joseph Buckminster, are erased in pencil. Below is written, in pencil, the name *Chas M pears Jr.* This ballot was counted for Mr. Peirce. Then, somewhat across the corner of the ballot, is written, also in pencil, the word *an* or *and*, the letter *d* being rather indefinite; and then, immediately along the side of the ballot, as

your committee read the writing, is written, in pencil, *fredrc p Shaw*. The surname Shaw is plainly written. The letters in the first name are irregular, and the *e* very obscure. The letter which the committee call a *p*, has the appearance of having been inserted after the rest of the name was written. This letter, occurring where it does, might be easily taken for a *k*, but it has the shape of a *p*, and, as the writer began Mr. Peirce's name with a small *p*, the committee are of the opinion, that this letter was intended for the middle initial letter in the petitioner's name. They think that no one could mistake the first name for Franklin.

Assuming the name to be Frederick Shaw, as returned by the ward officers, and the mayor and aldermen, the committee are unanimous in their conclusion, that there is sufficient evidence to show that the ballot was intended for the petitioner. The mistake in the name would then be like the omission of the middle letter "A" in the name of Jonas A. Champney, which was omitted in six material votes, but which were allowed for him, by the action of this house, *Arnold* v. *Champney*, *ante*, p. 121.

By counting this ballot for the petitioner, he had a plurality of one vote at the first election, and there was, therefore, no failure to elect. A second election could not then be held.

If, however, it should be decided, that there was no choice at the first election, no good reason was given, at the hearing, for holding the second election invalid.

While your committee regret that they are called upon to decide questions of such a nature, they are unanimous in the results to which they have arrived, and report the accompanying resolution.

[The resolution declared that the petitioner was entitled to the seat. The report of the committee was accepted, and the resolution adopted. H. J., 1875, p. 99.]

ORSAMUS MAXWELL *v.* EDMOND M. VINCENT.

House Document, No. 47. February 3, 1875. Report by A. B. COFFIN, *Chairman.*

Recount of Votes allowed. Where the election for representative was reported to have resulted in a tie, and, in one town in the district, 180 votes were returned, as cast for representative, while only 152 names were checked upon the voting list in the town, it was *held* sufficient ground for making a recount of the votes in the district.

The Committee on Elections, to whom was referred the petition of Orsamus Maxwell, asking for a recount of the ballots for representative for the fifth Franklin district, report thereon as follows: This representative district is composed of the towns of Charlemont, Heath, Buckland, Rowe and Monroe.

The certificate, transmitted to the secretary of the Commonwealth, pursuant to chapter 376, section 32, of the Acts of 1874 (Pub. Stats. chap. 8, sect. 16), stated that there was no choice of representative, at the election held in said district, on the 3d day of November last.

The returns from all the towns in said district, showed that Orsamus Maxwell, the petitioner, and Edmond M. Vincent, both of Heath, had each two hundred and eighty-seven votes, for representative.

No steps were taken for a new election; but the petitioner served the notices upon the town clerks of the several towns in said district, as prescribed in the 47th section of said chapter, claiming that he was elected, and desiring a recount of the ballots.

The fact was shown, to the satisfaction of the committee, that, in the town of Charlemont, only one hundred and fifty-two names were checked, on the check-list, at said election, whereas one hundred and eighty votes were returned, as cast in that town for representative.

Your committee deemed these sufficient grounds for making a recount, and, thereupon, caused the ballots cast in said district, and the check-lists used in said towns, at said election, to be produced before them. All the ballots cast in the district have been counted by your committee, with the following result, as to the vote for representative from said district to the general court: —

Edmond M. Vincent of Heath, . . .	288 votes.
Edward M. Vincent of Heath, . . .	15 "
Orsamus Maxwell of Heath, . . .	255 "
Josiah W. Griswold of Heath, . . .	3 "

By this count, which the committee have carefully made, it appears, that Edmond M. Vincent received a majority of the votes cast, and thirty-three more votes than were thrown for the petitioner, without including the fifteen votes for *Edward* M. Vincent of Heath. It is, therefore, unnecessary to decide, whether these latter votes were intended for Edmond M. Vincent, and very little, if any, evidence was before the committee on that point.

The error which caused the return of a *tie* vote, between the petitioner and Edmond M. Vincent, was the result of a mistake in counting the votes, in the town of Charlemont. The vote in that town, for representative, was returned as follows:

Edmond M. Vincent, ...	118 votes.
Orsamus Maxwell, ...	62 "

The committee found, by the recount, that only *thirty* votes were cast, in Charlemont, for Mr. Maxwell.

Mr. Vincent was notified of the hearing, but expressed his intention, by letter, not to appear, and his willingness to leave the matter with the committee.

The conclusion to which your committee have arrived is, that Edmond M. Vincent of Heath, was duly elected representative from said district. They therefore report that the petitioner have leave to withdraw, and also report the accompanying resolution.

[The resolution declared the sitting member entitled to the seat. The report of the committee was accepted, and the resolution adopted. H. J., 1875, p. 99.]

Seorem B. Slate *v.* Charles H. Green et al.

House Document, No. 59. February 8, 1875. Report by A. B. Coffin, *Chairman.*

Recount of Votes refused. The fact that the sitting member was returned, as elected, by a plurality of only six votes, and that, in one town in the district, the ballots were counted by two of the voters, invited by the selectmen to perform that service, no objection being made during the meeting to that manner of counting, will not justify a recount of the votes.

Duty of Selectmen to count the Votes. The duty of receiving, sorting and counting the votes, is imposed by law upon the selectmen, as sworn officers, and any custom of allowing unqualified persons to count the votes, deserves censure.

The Committee on Elections, to whom was referred the petition of Seorem B. Slate, for a recount of ballots, cast for representa-

tives, in the third Franklin representative district, at the election held on the 3d day of November last, having heard the petitioner, and the sitting members, submit the following report: The petitioner requests a recount, for the reasons that there was a great variety of tickets cast; that the ballots were altered and scratched in large numbers; that, in the town of Greenfield, the votes were counted by tellers, and not by the selectmen; and that the returns from the whole district showed that Charles H. Green of Northfield had but nineteen votes more, and William Keith of Greenfield but six votes more, than the petitioner received.

It was admitted, that the returns showed only the pluralities above stated. The house has decided, in *Green* v. *Bridgman*, *ante*, p. 216, that the fact of a small plurality is, in itself, no ground for a recount, thereby following the precedent referred to in that report.

It was also admitted, that the ballots in Greenfield were counted by two of the voters, who were invited, by the selectmen, to perform that service; and that no objection to that manner of counting was made by any one during the election.

The statute provides, that the votes "shall be received, sorted and counted, by the selectmen." This duty is, therefore, imposed by law upon those officers, and electors are entitled to have it performed by them, with the care and fidelity implied in their official oath.

Its performance by others, however, would seem to affect the validity of the election, rather than furnish a reason for a recount, since dishonest tellers might easily conceal, alter or destroy ballots, in which case, another count would still bring a false result.

While the custom of allowing unqualified persons to count ballots, deserves censure, it has been held an insufficient cause for avoiding an election. *Arnold* v. *Champney*, *ante*, p. 121.

There was no evidence, in support of the other allegations, which led your committee to doubt, that the votes were correctly counted and returned.

The committee, therefore, recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1875, p. 115.]

William Taylor *v.* Michael Carney.

House Document, No. 65. February 10, 1875. Report by A. B. Coffin, *Chairman.*

Recount of Votes refused. The fact that, in a recount by the aldermen, of votes for member of Congress voted for upon the same ballot with candidates for representative, it was discovered that two rolls of ballots, each marked as containing 100 straight tickets, in fact contained, one only 88, and the other only 78 ballots, is insufficient ground for a recount of votes, by the house of representatives, where the plurality of the sitting member was 134, and there was no evidence, from which the house can infer that other mistakes were probably made, the correction of which would change the declared result of the election.

Joseph M. Wightman *for petitioner.*

The Committee on Elections, to whom was referred the petition of William Taylor, for a recount of ballots for representatives from the second Suffolk district, cast at the election held the 3d day of November last, report as follows: — Ward 2, of the city of Boston, constitutes said district, which is entitled to three representatives to the general court.

It was admitted, that at said election the three sitting members, and the petitioner, according to the returns by the ward officers, received the following number of votes: —

Neil Doherty, ...	1,077
Patrick Collins, ...	1,017
Michael Carney, ...	1,005
William Taylor, ...	871

The counsel for the petitioner claimed, that said ballots ought to be recounted by your committee for this reason: The ballots cast in said ward, at said election, were examined and recounted by the aldermen of Boston, with reference to the vote for member of Congress. It was then discovered, by the aldermen, that of two rolls, each of which was marked "100 straight tickets," one contained but 88, the other but 78 ballots. These facts were admitted by Mr. Carney, one of the sitting members.

The mistake relates to 34 votes. There was no evidence introduced, tending to show for whom these ballots were cast, if they ever were cast.

If we assume that Mr. Carney was allowed, in the returns, 34 more votes than he actually received, or that the petitioner in fact received that number of votes more than were returned by him, Mr. Carney would still have a plurality of 100.

It was admitted, that no other error was discovered by the aldermen, in the vote of said ward, or in the returns of the ward officers.

The character of this error is such, in the opinion of the committee, as not to lead them to infer that other mistakes were probably made, the correction of which would give the petitioner a plurality. The committee, therefore, report that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1875, p. 121.]

MOSES F. CARR *v.* NATHAN M. HAWKES.

House Document, No. 71. February 11, 1875. Report by A. B. COFFIN, *Chairman.*

[In this case, the committee of the house of representatives refused to recount the votes cast in the seventeenth Essex district, no reason being assigned in the petition for such recount and the petitioner declining to offer any evidence in support of his petition, and reported that the petitioner have leave to withdraw. The report was accepted. H. J., 1875, p. 124.]

DENNIS G. QUIRK *v.* JAMES A. McDONALD.

House Document, No. 77. February 16, 1875. Report by A. B. COFFIN, *Chairman.*

Eligibility of Representative. Naturalization. Certificate conclusive. A certificate of the naturalization of the sitting member, issued by a competent court, and admitted to be genuine, is conclusive upon the question of his citizenship.

Same. Evidence. Upon the question whether the sitting member was a citizen, evidence that the certificate of naturalization, issued by a competent court, was obtained by fraudulent representations, as to the length of his residence in this country, is incompetent.

ROBERT M. MORSE, JR., *for petitioner.*
CHARLES ROBINSON, JR., *for sitting member.*

The Committee on Elections, to whom was referred the petition of Dennis G. Quirk, claiming the seat now occupied by James A. McDonald, as representative, from the first Middlesex representative district, having heard the claims of the petitioner, and the arguments of the respective counsel, have considered the same, and report thereon, as follows: — Ward 20, of the city of Boston, constitutes said representative district.

The counsel for the petitioner claimed, at the hearing before the committee, that the sitting member was ineligible to the office of representative, on the ground that he was not a duly naturalized citizen.

The sitting member produced a certificate of his naturalization, which was admitted to be genuine, issued by the United States Circuit Court for the district of Massachusetts, and bearing date March 2, 1868.

The petitioner claimed, and offered to prove, that this certificate was obtained upon false and fraudulent representations as to the length of time the applicant had resided in this country, and that these representations were made intentionally, and known by the applicant (Mr. McDonald) to be untrue. This offer of proof was rejected, the committee believing they had no right to examine the evidence, or grounds upon which the certificate of naturalization was granted.

It is due to the sitting member to state, that he denied these allegations in the most positive manner, and expressed, through his counsel, his readiness and desire to meet and answer any evidence which could be offered in their support, claiming and offering to show that he had resided in this country since 1858.

The authorities are numerous, and, so far as your committee are informed, entirely uniform, upon the question raised. The granting of naturalization is a judicial proceeding, based upon evidence, the examination of facts, and the action of the court thereon is in the nature of a judgment, conclusive and final. Chief Justice Marshall, in *Spratt* v. *Spratt*, 4 Peters, 407, states the law in these words: "The various acts upon the subject, submit the decision, on the right of aliens to admission as citizens, to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered, on record, as the judgment of the court. It seems to us, if it be in legal form, to close inquiry; and, like every other judgment, to be complete evidence of its own validity." The late Judge Curtis, in one of his opinions, adopts the language of Chief Justice Marshall. *Ex parte Cregg*, 2 Curtis, C. C., 98.

The same view of the law seems to have been taken, in all cases

where a similar question has been raised. *Campbell* v. *Gordon*, 6 Cranch, 176-182; *State* v. *Chesapeake*, 7 Cranch, 420; *Com.* v. *Sheriff*, 1 Brewster (Pa.), 184; *Com.* v. *Leary*, 1 Brewster (Pa.), 272; *Contested Elections*, 1 Brewster (Pa.), 130; *The Acorn*, 2 Abbott, U. S., 444.

The committee, therefore, report that the petitioner have leave to withdraw.*

* [NOTE BY THE EDITORS. *Naturalization a Judicial Act.* The finding of the committee, that naturalization is a judicial act, is correct, beyond question. The right to it is given by the statutes of the United States (U. S. Rev. Stats., Title XXX), passed under the authority conferred upon Congress by the Constitution (Art. I., § 8), "to establish an uniform rule of naturalization"; and, under these statutes, the right can be obtained, only by application to, and proof of, the required facts, before one of the designated courts. "Naturalization is a judicial act; it is made so by positive law, and is essentially so in its nature; for it is a cause to be heard and decided on evidence, and involves a question of legal right." Lowrie, C.J., *Rump* v. *Commonwealth*, 30 Penn. St. 475, 477. See, in addition to cases cited in the above report, *Ex parte Knowles*, 5 Cal. 300. Naturalization being a judicial act, requiring the examination of evidence, and the judgment of the court, it necessarily follows that the application must be heard and decided, by the court itself, and not by any clerk, or other ministerial officer of the court. In changing the former practice, in the New York courts, of allowing clerks of courts to issue certificates of naturalization, the Supreme Court said: "The court, and not the clerk of the court, is to admit the alien. And, as the court, before admitting him, is to be satisfied of certain facts, it follows, that the powers conferred upon the courts are judicial, and not ministerial or clerical, and, consequently, that these powers cannot be delegated to the clerks, but must be exercised by the court, and require an examination into each case, sufficient to satisfy the court of the facts." *In re Clark*, 18 Barb. (N. Y.), 444, 446. See, to the same effect, *Myers* v. *Moffet*, 1 Brewster (Penn.), 230. McCrary Elections, § 56.

Certificate of Naturalization conclusive evidence of Citizenship, in Election Controversies. The judgment of a court of competent jurisdiction, granting citizenship to an alien, is governed by the same rules that control every judgment of a court. It cannot be impeached, in an election controversy, or in any other collateral proceeding, but must be accepted, as final and conclusive evidence of the truth of all facts necessary to obtain it. "A certificate of naturalization issues from a court of record, when there has been proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character. This certificate is, as against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such." Mr. Justice Hunt, *Mutual Ins. Co.* v. *Tisdale*, 91 U. S. 238. "The judgment of the court, admitting the alien to become a citizen, is conclusive, that all the prerequisites have been complied with." *Stark* v. *Insurance Co*, 7 Cranch, 421. So, in an election controversy, the court *held*, that the certificate was the legal evidence of the judgment of a court of competent jurisdiction, collaterally in question in the action. It imputed absolute verity, and could not, if valid on its face, be thus impeached in this action. When alienage is in issue, the judgment of the court, admitting the alien to become a citizen, is conclusive evidence upon that point." *People* v. *Pease*, 30 Barb. (N. Y.) 588, 604, affirmed in S. C., 27 N. Y. 45. And, in *People* v. *McGowan*, 77 Ill. 644, the court *held*, in a *quo warranto* proceeding, involving the citizenship of a person elected as judge, that, as he had a certificate of naturalization, it was not open to the contestant to show, that such person had made no preliminary declaration of intention, had not served in the army or navy, and came to the United States after he was twenty-one years of age, — because it must be conclusively pre-

[The report of the committee was accepted. H. J., 1875, p. 141.]

sumed that the court, granting the naturalization, heard evidence, and was satisfied, that all the requirements of the law had been complied with. To the same effect, see *Ritchie* v. *Putnam*, 13 Wend. 524; *Banks* v. *Walker*, 3 Barb. Ch. (N. Y.) Rep. 438; *McCarthy* v. *Marsh*, 5 N. Y. 263; *Gibbons* v. *Sheppard*, 2 Brewster (Penn.) 74.

Informal record of Naturalization Proceedings will not impair the Certificate granting Citizenship. In an elaborate opinion, in 1879, Mr. Justice Blatchford decided, that where an applicant for citizenship complies with the conditions imposed on him, as prerequisites to his admission to citizenship, and the unlawfulness, if any, is in the want of form in the record of the court, and he receives, at the time, from the court, a certificate of naturalization, such certificate is valid; saying: "There must be an act of admission (to citizenship), by the court; but the court has a right to say what it will regard as its act of admission, and it has a right to say what it will regard as its order that the applicant be admitted, and what it will regard as his admission. Whatever the court says is its act of admission, and whatever the court says is its order of admission, is such act and such order, whenever the question is brought up, in a collateral proceeding, provided there is sufficient reasonably to amount to such act and such order." *In re Coleman*, 15 Blatchford, 406, 422. And Mr Justice Field, in the case of *McCoffin*, 5 Sawyer, 630, *held*, that the validity and efficacy of a judgment, admitting a person to citizenship, are not impaired by an inaccurate statement in its recitals, as such recitals constitute no part of the judgment. And see, *Campbell* v. *Gordon*, 6 Cranch, 176; *St. Paul, &c., R.R.* v. *Burton*, 111 U. S. 788; *Commonwealth* v. *Paper*, 1 Brewster (Penn.) 263.

What may be shown in Election Controversy to impeach Certificate of Naturalization. The certificate of naturalization, representing the judgment of a court admitting the applicant to citizenship, is conclusive upon any question of birth, age, residence, service in the army or navy, filing of preliminary declaration, or any other fact necessary to prove, in order to obtain it. Its validity can be impeached, however, in an election controversy, to the same extent, and in the same manner, as any other judgment of a court. 1. So the question whether a certificate of naturalization has been granted or not, by the court, is always open to inquiry. If the certificate is a forgery, or fraudulently granted, without judgment of the court, it is null and void, and may be so treated, in any election controversy, or other collateral proceeding. The inquiry here is not whether the person was entitled to naturalization, but whether he was in fact naturalized; and, as in the case of any judgment, while inquiry into the facts upon which it is based, or necessarily involved in it, is closed by the judgment, the question in any proceeding may be raised, whether the judgment claimed was, in fact, ever rendered. "The distinction between cases in which judgments may, and those in which they may not, be impeached collaterally, as derived from the authorities, and founded in common sense, may be stated thus: they may be impeached by facts, involving fraud or collusion, but which were not before the court, or involved in the issue, or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court, and passed upon." *The Acorn*, 2 Abbott's U. S. Rep. 434, 445. And see, *Preston* v. *Culbertson*, 58 Cal. 198; *In re Registry Acts*, 2 Brewster (Penn.) 138; *Commonwealth* v. *Leary*, 1 Brewster, 270. 2. The question whether the court granting the certificate of naturalization had jurisdiction to do so, or not, is always open to inquiry, in an election controversy, or other proceeding. If the court was without jurisdiction, it could enter no valid judgment, and the proceeding to obtain it was not, in legal effect, judicial. The judgment, being absolutely void, may be so regarded, whenever it is called in question. While the presumption is in favor of the jurisdiction exercised by the court, in entering the judgment, the question of jurisdiction may be raised in a collateral proceeding. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; *Mercer* v. *Chace*, 9 Allen, 242; *Cook* v. *Darling*, 18 Pick. 393.

WILLIAM A. HASKELL *v.* HARRISON CLOSSON.

House Documents, No. 78 and No. 98. February 16, 1875. Report by A. B. COFFIN, *Chairman.*

Recount by Aldermen. When must be made. Under chapter 376 of the Acts of the year 1874, §§ 27 and 42 (substantially Pub. Stats., chap. 8, §§ 10 and 11), the time within which a petition for a recount of votes can be received, and acted upon, expires with the adjournment of the meeting of the clerks.

Unauthorized Recount of Votes void. A recount of votes, in a ward of a city, by the aldermen, after the time fixed therefor by law, is illegal and void; and the return of the election, as amended by the result of such recount, cannot be regarded as the true return from the ward.

Recount of Votes ordered by House of Representatives. Where votes cast in a ward, forming part of a representative district, were, in good faith recounted by the aldermen, after the time prescribed by law, and such recount showed that the petitioner had a plurality of the votes in the district, instead of the sitting member, who had a plurality according to the original return, the house (against the report of the majority of the committee on elections) ordered a recount of the votes, for representative, in the whole district. Upon such recount the petitioner was found to be elected, and the seat was given to him.

WILLIAM D. NORTHEND *for petitioner.*
CHARLES R. TRAIN *for sitting member.*

The Committee on Elections, to whom was referred the petition of William A. Haskell of Marblehead, for the seat now occupied in the house by Harrison Closson, as representative from the fifteenth Essex representative district, having heard the claims of the petitioner, and of the sitting member, and the arguments of their counsel, submit the following report: — The fifteenth representative district, in the county of Essex, is composed of the town of Marblehead and the fifth ward of the city of Salem, and is entitled to two representatives. Harrison Closson and William B. Howard now occupy seats in this house, as representatives from said district. The right of Mr. Howard to hold his seat is not questioned.

The grounds on which the petitioner claims the seat occupied by

That the jurisdiction of the court granting naturalization may be inquired into, in an election controversy, see *Commonwealth* v. *Lee*, 1 Brewster (Penn.) 273; *In re Barron*, 1 Brewster, 383. It may be added that, under the Act of Congress, U. S. Rev. Stats., § 2165, the courts authorized to admit aliens to become citizens are "a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the States, having common law jurisdiction, and a seal and clerk." Each State, however, having control over its own courts, may restrict their jurisdiction over naturalization, as each may by statute provide. *Ex parte Stephens*, 4 Gray, 559.]

Mr. Closson, are set forth in his petition, in the following language: —

"*First.* That 763 of the legal voters in said district voted for the petitioner, and but 756, for Harrison Closson.

"*Second.* That the vote, as originally returned by the proper ward officers of the fifth ward of Salem, in said representative district, was 229 for Harrison Closson, when, in truth and in fact, he received only 216 votes in said ward."

At the hearing before the committee, the petitioner, in support of his allegations, relied upon the result of a recount of the ballots in said ward 5, made by the aldermen of Salem at the time, and under the circumstances hereinafter set forth.

The election was held the 3d day of November. It was admitted that, in pursuance to the 27th section, chapter 376, of the acts of the year 1874, the meeting of the clerks was duly held at Marblehead, at noon, on the day following the election; that said meeting of the clerks was not adjourned, but that they, on that day, — to wit, November 4, — made out, over their hands, the complete returns of the votes of the whole district, for representatives; and that, on the same day, certificates of the election of said William B. Howard and Harrison Closson were accordingly issued.

By those returns, the sitting members and the petitioner received the following number of votes: —

William B. Howard of Marblehead, ...	867
Harrison Closson of Marblehead, ...	765
William A. Haskell of Marblehead, ...	763

There were several votes returned, for various other persons. It will be noticed that, by these returns, Mr. Closson received two more votes than the petitioner.

On the 5th of November, the city clerk of Salem was notified, in writing, by ten or more citizens of said ward, that they had reason to believe that the returns of the ward officers of ward 5 were erroneous.

The aldermen of Salem, on the 6th of November, opened the ballots cast in ward 5, and examined or recounted them.

It was admitted, at the hearing, that, according to the returns of the recount of ballots, so made by the aldermen, Mr. Closson had, in ward 5, nine votes less than were returned for him by the ward officers.

As the case now stands, if the returns of the ward officers are to be taken as the true return of the vote of ward 5, Mr. Closson is entitled to hold his seat. If, however, the recount by the alder-

men was legal, and the returns, as altered by the recount, are to be considered the true return of the vote in said ward, then the petitioner can rightfully claim the seat.

There was no charge or intimation of any illegal or improper conduct on the part of the ward officers, in counting the ballots or making their returns; nor was there any charge of a fraudulent intent, on the part of the aldermen, in opening said ballots.

The petitioner served notice on the city clerk of Salem, and the town clerk of Marblehead, within sixty days after the election, claiming an election to the office of representative from said district.

As the case was presented, at the hearing before the committee, in connection with the facts admitted, this question arises: Which are the *legal and true returns* of the vote in said ward, the returns made by the ward officers, or those returns as amended by the aldermen?

This question involves a careful examination, and the interpretation and intent of certain provisions in chapter 376 of the acts of the year 1874, for the preservation of ballots in cities, and for an examination of the ballots by the aldermen.

The 42d section of said chapter (being the same, in substance, as found in Pub. Stats., chap. 7, §§ 34, 35, 36 and 37), contains the provisions of law for retaining and recounting votes.

It will be observed, that said section fixes and limits the time within which the notice, by ten or more citizens, shall be given to the city clerk, and also, the time within which the ballots of the ward shall be examined by the aldermen. Both of those acts must be done "within the time prescribed by law for forwarding returns, or declaring the results of an election"; and, by referring to the 27th section of said chapter 376 (which is the same as the 10th and 11th sections of chapter 8 of the Public Statutes), we shall ascertain the time fixed therefor.

The time "for forwarding returns, or declaring the results of an election" (except as provided in Pub. Stats., chap. 8, §11), is at the meeting of the clerks, held at noon, on the day following the election, and the time expires with that meeting. If, however, the meeting of the clerks is adjourned, the time for declaring the result is at the adjourned meeting. In this case, there was no adjournment, so that the time for declaring the result expired with the meeting, on the 4th of November. The result of the election was declared on that day, and certificates were issued accordingly. The notice, by ten or more citizens, was not given to the city clerk until November 5th, and the examination or recount of the ballots,

by the aldermen, did not take place until November 6th, two days after the time fixed therefor by the statute had expired. The aldermen, therefore, opened and examined said ballots without authority, and in violation of the law. The evident intent of the statute is, that the ballots shall be examined before the certificate of election is issued.

A case somewhat similar to the one we are now considering, was reported to this house in *Davis* v. *Murphy*, *ante*, p. 177. That case arose in the third Essex representative district, composed of the town of Methuen and six wards of the city of Lawrence. The petitioner there claimed, in his petition, that a recount of all the votes in the district would show that he had a plurality. The aldermen of Lawrence had recounted the votes of five wards in the district, after the time allowed therefor had elapsed. The result of the recount, with the returns from the rest of the district, gave the petitioner, Mr. Davis, a plurality. The committee there interpret "the meaning of declaring the results of an election for representatives to the general court to be, whenever the clerks of towns and cities comprising a representative district have met and compared transcripts and ascertained what persons have been elected"; and the committee say, "that the aldermen of the city of Lawrence had no authority to recount the ballots, at the time they did, for the reason that the notice to the city clerk had not been given within the proper time." There were other elements in that case. The ballots were transmitted by the ward clerks to the city clerk; the ward seals were sent to the city clerk; and the ballots in Methuen had not been very carefully preserved, nor were they sealed up, until a day or two after the election. The majority of the committee recommended that the sitting member was entitled to his seat, and the minority recommended that a vacancy be declared, if the house held that a recount could not be had. The report of the majority was accepted. A greater number of provisions were violated, in that case, than in the present one, but they are all of the same class. The case tends to show that, in the opinion of the house, at that time, the statutes referred to ought to be strictly interpreted and complied with.

Section 42, of said chapter 376, is in the fourth division, entitled "PROVISIONS RELATING TO THE PRESERVATION OF BALLOTS AND CHECK-LISTS IN CITIES." It is obvious, that the purpose of these provisions can be gained, only by following them with great care. They would seem to be peremptory, in their nature and intent, rather than merely directory. As, by the very terms of the statute, the "amended return shall stand as the true return of the ward,"

it is important that the opening and examination of the ballots be done under every safeguard which the law provides.

In this case, as in the one cited, no want of good faith was imputed to the aldermen. It should be borne in mind, however, that the acts of dishonest parties might be the same, and that the intention is often difficult of discovery.

The question of a recount of the ballots, by the committee, although not necessarily arising, has been considered by them, and they are unanimous in the opinion that, if a recount is desired, it should, in this case, be ordered by the house. If the house shall advise a recount, your committee recommend that they be instructed to count the ballots of the whole district.

Five of the committee deem a recount injudicious; Mr. Smith and Mr. Rice, of the committee, think otherwise.

The whole case may involve these questions: Is it legal, or prudent, that the ballots of ward 5 be counted again, by the committee, after having been opened as above stated? If it is not, which shall be accepted as the true returns, those of the ward officers, or those returns as amended by the aldermen?

With a view of presenting these questions for the decision of the House, the committee report that the petitioner have leave to withdraw.

[The House recommitted the report, with instructions to count the votes for representative in the district. H. J., 1875, p. 137.]

Thereupon, the committee counted the said votes, and reported as follows: —

The Committee on Elections, to whom was recommitted their report on the petition of William A. Haskell, for the seat occupied by Harrison Closson, as representative from the fifteenth representative district, in the county of Essex, with instructions to count the votes cast for representatives from said district, have attended to that duty, and respectfully report the result to be as follows: —

William B. Howard of Marblehead,	had 870	votes.
William A. Haskell " "	" 761	"
Harrison Closson " "	" 747	"
Josiah B Osborne of Salem,	" 688	"
George K. Hamson of Marblehead,	" 133	"

Scattering votes were cast for other persons.

The said ballots were produced before the committee, sealed, and properly certified. The city clerk of Salem testified that those

of said ballots cast in ward 5, Salem, were delivered to him, by a constable of that city, on the day of election, and had been in his possession ever since that time, and had not been opened, or interfered with, excepting that the mayor and aldermen of Salem, had, in his presence, opened and recounted them, as before reported by your committee. The mayor of Salem, at that time, and one of the aldermen, who assisted in the recount, testified that said ballots were opened and counted, as stated in the report of the committee, but that they were all carefully preserved, and re-sealed. The town clerk of Marblehead also testified, that the ballots cast in that town had been in his possession unmolested since the day of the election. The result of the count of the ballots of ward 5, by the committee, is substantially the same as that of the count by the mayor and aldermen.

In the ballots of Marblehead, the committee find, after a very careful count, nine less for the sitting member (Mr. Closson) than were allowed for him in the returns of the vote of that town.

According to the count, by the committee, of the ballots cast in the whole district, the petitioner received fourteen votes more than were cast for Mr. Closson; and your committee, therefore, report tht accompanying resolution: —

[The resolution declared that the petitioner was entitled to the seat. The report was accepted, and the resolution adopted. H. J., 1875, p. 173.]

SENATE — 1876.

Special Committee on Return of Votes for Senators — Hon. SELWYN Z. BOWMAN, Hon. CHARLES HOWES, Hon. CALEB RAND, Hon. BYRON WESTON, and Hon. SAMUEL S. GINNODO.

WILLIAM KEITH ET AL. *v.* HORACE H. MAYHEW.

Senate Document, No. 57. February 25, 1876. Report by all the Committee.

Eligibility of Senator. Inhabitancy. The test of domicile, to determine whether a person has left a former domicile, and gained a new one, is his intention, as gathered from all the facts in the case,—not only from his mere declarations of intention, but also from all the attendant circumstances. The mere fact of removal, in itself, is of little weight, to show that the domicile has been changed; as, when a man has once acquired a domicile, the fact of changing his residence, and the intention of remaining in the new residence, must both concur, in order to establish a new home.

Same. Evidence. There are two classes of evidence, by which to prove this intention of remaining: *first*, the facts and circumstances of the case; and, *second*, the declarations of the party, — not only those made at the trial, but those previously made by him to third parties.

Same. Such declarations, while entitled to their full weight, as competent evidence, are not conclusive, but the *acts* of the party must also be considered; for his *intention* is not merely what he may say, or believe, but a legal fact, to be proved by his acts and declarations.

Same. On the question, whether a person elected senator had been an inhabitant of the Commonwealth for the space of five years immediately preceding the election, in November, 1875, it *appeared*, that he was born in Charlemont, and had resided there, with his wife and daughter and two sisters of his wife, occupying for some years the homestead of his father-in-law, owned by his wife and her sisters, until the summer of 1870; he then formed a partnership with a resident of Rockville, Conn., for one year, in the clothing business in that place, and dissolved his former partnership in Massachusetts, with the agreement that he could renew it at the end of the year; he went to Rockville, boarding there with his brother-in-law, for a while, and afterwards bought a house, into which he moved his wife and daughter in January, 1871; he left his wife's sisters in the house in Charlemont, paying the household expenses, and retaining his pew in that place; in January, 1870, 1871, and 1872, he was elected a director in the Shelburne Falls National Bank, making oath, each time, that he was a resident of Massachusetts; he was assessed and paid a tax upon his house and personal property, in Rockville, for 1871, supposing that persons, even if non-residents, were liable to such taxation; his name was never on the list of voters in Rockville; he remained in Rockville over the year, but closed his business in December, 1871, sold his house there, and soon afterwards returned with his family to Charlemont, and renewed his former partnership; he repeatedly declared that he did not intend to live in Connecticut, and went there only temporarily, intending to return to Charlemont, which place he always considered his

home; it was *held*, that he had not lost his domicile in Charlemont, but had been, for five years previous to the election, an inhabitant of Massachusetts, and was eligible to election as senator.

CHESTER C. CONANT and S. O. LAMB *for petitioners.*
CHARLES ALLEN and HENRY WINN *for sitting member.*

The Committee on Returns of Votes for Senators, to whom was referred the "Remonstrance of William Keith and others against the right of Horace H. Mayhew to a seat in the Senate, and petition that David Aiken may be admitted to a seat," respectfully submit the following report:

This was a case in which the petitioners alleged that Mr. Mayhew had not, at the time of the election, been an inhabitant of this Commonwealth for the space of five years immediately preceding the date of such election, and therefore was not, under the Constitution of this State, capable of being elected as a senator, and that David Aiken received the next highest number of votes at said election, being the highest number given for any person capable of being elected as a senator from the Franklin senatorial district; and the petitioners therefore prayed that the said Aiken might be declared elected as senator from said district.

It was agreed by all the parties at the hearing, that the returns of the elections were substantially correct, by which it appeared that Mr. Mayhew had 2,207 votes, and Mr. Aiken 2,063 votes, and that Mr. Mayhew is entitled to his seat as senator, unless disqualified for the reasons as in the petition set forth.

The case, both as to the evidence and the law, was presented to the committee in a very full and thorough manner, by the able counsel of the petitioners and of Mr. Mayhew, and from the importance of the questions involved and the time spent and expense incurred in the preparation and presentation of the case, by the parties interested, the committee have felt it their duty to reach a conclusion only after a most careful consideration, and such consideration they have given to the various questions of fact and of law which have arisen.

There was at the hearing very little difference of opinion between the parties, as to the actual facts of the case, except in regard to some matters of minor importance which will be hereafter referred to; but the principal difference of opinion was as to the inferences of law and fact to be drawn from the evidence.

The committee deem it unnecessary to state all the evidence in detail, but make the following statement of facts, as comprising the substance of all the evidence in the case.

Mr. Mayhew was born, and now lives, in the town of Charlemont in Franklin County, and has always had his residence in

that town, unless, during the time he was in Connecticut, as hereinafter stated, he became a resident of the latter State, or lost his residence in Charlemont. As selectman, assessor, and otherwise, he had at various times occupied official stations in that town, and no question is raised that, at the time of his leaving Charlemont to go to Connecticut, he was, in all respects, legally a "resident," or "inhabitant," of Charlemont, and a voter there. His residence in Charlemont since 1858 has been on the homestead formerly owned by his father-in-law, and since that year this homestead has been owned as follows: two undivided seventh parts, by Mr. Mayhew and his wife, and the remaining five sevenths, by the two sisters of Mrs. Mayhew, who have lived with Mr. Mayhew. Mr. Mayhew subsequently bought some additional real estate adjoining the homestead. Since 1858 his family, resident in the said homestead, has consisted of himself and his wife and two sisters of his wife, and he also has one daughter; these have been considered by him as his family, and he has provided for them as such, except that it appeared in evidence that the two sisters received, from other sources, small sums for their clothing or spending money. All the household expenses have been paid by Mr. Mayhew.

In March, 1869, Mr. Mayhew and a Mr. Merrick became copartners together in the clothing business at Shelburne Falls, about eight miles distant from Charlemont, and the copartnership continued until Mr. Mayhew went to Connecticut. Mr. Mayhew, during this copartnership, retained his home at Charlemont, attending to his business at Shelburne Falls, and going home two or three times a week. Shelburne Falls is also in the Franklin senatorial district.

In the summer of 1870, a Mr. Pember of Rockville, in Connecticut, and engaged there, in the clothing business, also, came to Shelburne Falls, and talked with the partners there about their taking an interest in his business. The partners talked it over together, and thought it would be for their interest to make some connection with Mr. Pember. There was some evidence, presented to the committee, tending to show that the partners thought that Mr. Pember could buy cloth to better advantage than they could, and that, by a business connection with him, and with the manufacturers, they could secure an advantage to themselves, also, in this respect. Mr. Merrick and Mr. Mayhew agreed that some arrangement should be made for a partnership with Pember, and upon the suggestion, made by Mr. Mayhew, that their both becoming partners also in a second establishment, with Pember, would make confusion, in case of the death of either party, it was agreed that

Mr. Mayhew should enter into the business with Pember. The partners then made the following arrangement: the new brick store for their business, commenced in the preceding spring, and owned jointly by them, was to be completed, Mayhew retaining his interest in it. Their copartnership was dissolved, Merrick buying out Mayhew, and Mr. Mayhew was to have the right, at the end of one year, to come back into the firm by paying for one-half of the then stock of goods, nothing to be charged for the good will of the business.

Mr. Mayhew went to Rockville, in Connecticut, Sept. 8, 1870, and made with Mr. Pember an agreement of copartnership for one year in the clothing business in that place, and went to board with his brother-in-law, and did not then intend to bring his family down. His brother-in-law resided in Rockville, and, having bought another place, wished Mr. Mayhew to purchase the place where he then lived; and, upon Mr. Mayhew's saying that he did not want to make an investment, which would prevent his leaving at any time, Mr. Maxwell, his brother-in-law, said that he would sell the place so cheap (for $5,000), that he could make money by selling it at any time for $6,000. He bought the place for the $5,000, and did sell it subsequently for $6,000. The deed to him, of this place, of date of Oct. 22, 1870, describes him as "Horace H. Mayhew, of said Vernon," and the deed of the same place, from him, of date Jan. 2, 1872, describes him, likewise, as "Horace H. Mayhew, of Vernon, in Tolland County." Rockville was the name given to a village in, or a part of the township of, Vernon. The deed to Mr. Mayhew was drawn by Mr. Maxwell's lawyer, and handed when executed to Mr. Mayhew, and he did not examine it, as he testifies, and his evidence is uncontradicted; and the deed from him was drawn by a lawyer, from the deed which ran to him, and Mr. Mayhew signed it without examination.

He bought all the furniture for this new house, not removing any from his old homestead.

In the middle of January, 1871, he and his wife and daughter commenced living in the new house (his wife and daughter having just left Charlemont for this purpose), and they remained there until Jan. 1, 1872, when they all went back to the homestead in Charlemont, where they have continued to live ever since. In using the terms "live," "homestead," "residence," etc., in this statement of facts, the committee do not wish to be understood as using them in their strict legal and technical sense, or as expressing a legal fact or conclusion, but only in their ordinary acceptation, as synonymous with "living" or "being," or the place of living or being. During Mr. Mayhew's absence in Rockville, his two sis-

ters-in-law continued to live in the house in Charlemont, and he paid the expenses of living of the family there; in the early part of 1871 (and also of 1872), had his stock of ice and wood put in for the year; had various repairs made upon the premises, which were taken care of by a man employed by him for that purpose; and Mr. Mayhew, during his said absence in Rockville, used occasionally, and generally once in three or four weeks, to go up to Charlemont, to look after his interests there. He retained his pew in the church at Charlemont, and paid his subscription therefor in the nature of pew-rent. It will be remembered that Mr. Mayhew's absence in Rockville continued from Sept. 8, 1870, to Jan. 1, 1872; that is to say, through the year 1871, and the last four months of 1870. In Charlemont he paid his taxes for 1871 on his real estate there, for which he was assessed by the assessors as a non-resident, and he was not assessed a poll-tax, or tax upon his personal property, — which personal property, liable to taxation, was of small value, and consisted principally of two cows. He rendered in no list to the assessors; had not been in the habit of rendering in such a list; did not know that he was taxed as a non-resident, but, meeting the collector of Charlemont, asked the collector the amount of his tax, and of that of his sisters, and sent him a check therefor, when he had returned to Rockville.

In 1871 he paid a tax in Rockville, on his real estate there, and on a watch and piano, which taxation was made up from a list given by him to the assessors. It was a printed blank, where, opposite the printed words, "house," "watch, etc.," "piano-forte, etc.," he had filled out that he had these articles. The original blank was lost, and therefore not put in evidence. From the inspection of the form of blank used, it does not appear that he filled it out either as a resident or non-resident, and there is no printed word or special blank for that purpose, and it appears from Mr. Mayhew's testimony that he did not specify, in his return, whether he was a resident or non-resident, and that he did not return a poll-tax. There was no evidence, as against his assertion, to convince the committee that the poll-tax was returned by Mr. Mayhew in his list, and the committee, therefore, find that it was not so returned by him. He returned no list for taxation in 1870. Taxes are there assessed as of the first Monday in October. In 1870 and 1871 he was assessed, on the assessment lists of the assessors, as a resident, and was assessed for a poll-tax for each year, on such lists, but he did not see, and had no knowledge of how those lists were made up, and it did not appear that those lists came to his knowledge in any way. When he paid the taxes for

those years, the collector gave him the gross sum, and he paid, without examination into the items or details.

His name was never on the voting-lists in Vernon, and he did not vote there. His name was on the voting-lists in Charlemont, in 1872, which were prepared October 25. The voting-list of Charlemont of 1871 was lost, and it did not appear to the satisfaction of the committee, whether his name was on that list or not. He did not vote in either of these years, and it did not appear that he took any action in regard to placing his name on, or removing it from, the voting lists. At the fall election, in 1872, he was in Charlemont, but then made declarations to persons there, to the effect that he could not vote for Grant anyhow, and he did not care about voting, as his vote would not make any difference in the result, and as some thought that he had not a right to vote he would not raise any questions in the meeting by voting. One witness testified that he (the witness) thought Mr. Mayhew said that he was not a voter, but the committee find, on all the evidence, that the fact is as above stated, although the question would seem to be of little importance, as the fact of Mr. Mayhew's believing, or not believing, that he was a voter, would have but a very remote bearing upon the question whether or not he was in fact a voter. Mr. Mayhew's wife, on letters of date in November, 1871, from the church in Charlemont, joined the church in Rockville Nov. 5, 1871. During his absence in Connecticut, the scythe-snathe business was still carried on, as formerly, in Charlemont, by Mr. Mayhew and Mr. Edwards.

The business in Rockville was lucrative, and Mr. Mayhew continued it, beyond the expiration of the year fixed for the partnership; closed the business, and sold out to Pember, in the middle of December, 1871, and, with his family, moved back to Charlemont, Jan. 1, 1872; at the same time he resumed his partnership with Mr Merrick at Shelburne Falls, and has since continued in that business with him.

Various evidence was offered, as to the declarations at different times of Mr. Mayhew, in regard to his intention of abandoning his residence in Charlemont. The committee find upon that evidence that just previously to going to Rockville, and while he was there, Mr. Mayhew made declarations to several parties both in Charlemont and Rockville, (to his partner Mr. Merrick, Mr. Kellogg of Hartford, Mr. Bissell of Vernon, and others), that he did not intend to live in Connecticut, and only went there temporarily, and should return to Charlemont, and considered it his home.

In January, 1871, and in January, 1872, he was elected a director of the Shelburne Falls National Bank, and, as required

by law, signed and made oath to a statement, that "I do solemnly swear that I am a citizen of the United States, and resident of the State of Massachusetts," etc. These statements are respectively dated Jan. 14, 1871, and Jan. 9, 1872. A similar certificate was made Jan. 11, 1870. A deed was made, of date Dec. 23, 1871, to Mr. Merrick and "H. H. Mayhew, of Rockville, Conn.," of land in Shelburne Falls, and it appeared from the evidence of Mr. Mayhew, that, at the time it was executed, he was confined to his bed by sickness and did not see it until after it was executed.

While in Rockville, he was asked to be a director of the bank there, but refused, because he said he did not intend to stay. He retained, while thus absent, all his interests in real estate in Massachusetts, and said at the time in reply to inquiries as to his selling such real estate, that he did not want to sell as he was coming back again.

Although some of the above evidence may be immaterial, or have at least a very remote bearing upon the questions in dispute, the committee have deemed it advisable to give a full statement of the facts in the case, in order that all the circumstances in regard to it may be understood. It may also be said, that Mr. Mayhew testified before the committee positively and unequivocally, that it had always been his intention to retain his home in Charlemont, and to go to Rockville only temporarily, and "to make some money," and to return to his old home, at the end of the year of his partnership with Pember, though he was not sure but his stay would be protracted into the second year, to close up his affairs.

The above statement comprises substantially all the evidence which was presented before the committee.

The question then arises what, as applied to these facts, are the questions of law involved in this case.

Mr. Mayhew claims, that he has always been an inhabitant of Massachusetts. The petitioners claim that during the sixteen months when he was in Rockville, he was an inhabitant of Connecticut, and therefore that, at the time of the last election, he was not legally capable of being elected as a senator from the Franklin district, under that provision of the Constitution, which is as follows: — "Each district shall elect one senator, who shall have been an inhabitant of this Commonwealth, five years at least, immediately preceding his election, and, at the time of his election, shall be an inhabitant of the district for which he is chosen; and he shall cease to represent such senatorial district when he shall cease to be an inhabitant of the Commonwealth." [*Article 22 of Amendments to Constitution.*]

The principal question, then, is as to what is the legal meaning

of the word "inhabitant," and the framers of the Constitution, realizing that this question would arise in the future as the meaning of that, and similar words, had been the occasion of discussion, and of the construction of the courts in the past, endeavored to set it at rest, by proceeding to define the word "inhabitant," but their definition leaves the question where they found it, and does not, in itself, "remove all doubts." "And, to remove all doubts concerning the meaning of the word 'inhabitant,' in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected, into any office or place within this State, in that town, district or plantation, where he dwelleth or hath his home." [*Const. — Part 2d, Chap. 1, Sect. 2.*]

The point in issue resolves itself into this: For the five years immediately preceding the second day of November last, was Mr. Mayhew an inhabitant of Massachusetts, and, in other words, did he dwell, or have his home, in Massachusetts, or was he from Sept. 8, 1870, to Jan. 1, 1872, an inhabitant of Connecticut, and did he dwell and have his home in that State? The legal gist of the case is, as to the proper construction and meaning of the words "inhabitant," "dwelling-place," and "home."

It has been often decided, that the words "residence," "inhabitancy," "domicile," and "home," have substantially the same meaning and are of the same legal effect. *Thorndike* v. *Boston*, 1 Met. 245; *Opinion of Judges*, 5 Met. 588; *Blanchard* v *Stearns*, 5 Met. 304; 2 *Kent Com.* (12th ed.), 431, note and cases; 2 *Burrill's Law Dict.*, 77, and cases. And, although the word "dwell," has not so frequently been the subject of legal construction, yet its meaning has become fixed by the decision of the courts, and it has the same legal effect. *Shaw* v. *Shaw*, 98 Mass. 159, and cases. "The words to live, and to reside, in these provisions, are obviously synonymous, and both relate to the domicile of the party, or the place where he is deemed, in law, to reside, which is not always the place of one's present actual abode. To live, to reside, to dwell, to have one's home or domicile, are usually, in our statutes, equivalent and convertible terms." *Abington* v. *Bridgewater*, 23 Pick. 176; 2 *Burrill's Law Dict.* 77; *Harvard College* v. *Gore*, 5 Pick. 379. "The same question would arise, upon the word dwelt, as upon the word inhabitant, and it will admit of the same construction."

Webster's Dict. "Dwell: To abide as a permanent resident, or to inhabit for a time; to live in a place; to have a habitation for some time or permanence." The words "domicile," then, or "inhabitancy," or "home," which may be taken as synonyms of each other, and of the other words used in this connection, have come,

as shown by the text-books, and by a long series of decisions by the courts, to have a well-defined meaning, and may, perhaps, be best defined, as "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there, for an unlimited time." 4 *Phillimore's Inter. Law*, 45. "Domicile answers very much to the common meaning of our word 'home'; and, where a person possessed two residences, the phrase, 'he made the latter his home,' would point out that to be his domicile." 2 *Kent Com.* (12th ed), 430, note; *Wharton's Law Lex.* 294.

The test of domicile, and to determine whether a man has lost a former domicile, and gained a new one, is his intention, as gathered from all the facts in the case, not only from his mere declarations of intention, but also from all the attendant circumstances. The mere fact of removal, in itself, is of little weight, as showing that the domicile was changed; as, when a man has once acquired a domicile, the fact of changing his residence, and the intention of remaining in the new residence, must both concur, in order to establish a new domicile for him. In other words, to apply the doctrine to this case: if Mr. Mayhew lost his residence in Massachusetts, and gained one in Connecticut, it must appear, either from his declarations or the facts in the case, that he had the intention of abandoning his old residence, and acquiring a new one, as well as that he did, in fact, take up his residence in Connecticut. *Sears* v. *Boston*, 1 Met. 252. "Where an old resident, and inhabitant, having a domicile, from his birth, in a particular place, goes to another place, or country, the great question, whether he has changed his domicile, or whether he has ceased to be an inhabitant of one place and become an inhabitant of another, will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode, until some new resolution be taken to remove. If the departure from one's fixed and settled abode, is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning, and resuming the former place of abode, as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant, at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties." *Thorndike* v. *Boston*, 1 Met. 246; *Opinion of Judges*, 5 Met. 589; *Worcester* v. *Wilbraham*, 13 Gray, 590.

"A person cannot be said to lose his domicile, or residence, by leaving it, with an uncertain, indefinite, half-formed purpose, to

take up his residence elsewhere. It would be more correct to
that he would not lose his residence, until he had got to a new
with a fixed purpose to remain there, and not to return to
former home. Until his purpose to remain had become fixed
could not be said to have abandoned his former residence." J
son v. *Palmer*, 8 Allen, 552. "It has been settled by a seri
cases in this Commonwealth, that the question of domicile usu
involves, not only actual residence, but the intention and pur
with which such residence is accompanied." *Shaw* v. *Shaw*
Mass. 160; *Harvard College* v. *Gore*, 5 Pick. 377; *Lyman* v. *F*
17 Pick. 234; *Putnam* v. *Johnson*, 10 Mass. 488. In other wo
in order that a man may acquire a new residence, or domicile
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cile, as such, must concur. *Bangs* v. *Brewster*, 111 Mass.
It is also a fundamental principle of the law of domicile, th
person can only have one domicile at the same time. He
have a domicile somewhere, and that domicile, so far as his ri
of voting, and of election to office, and his other rights, the e
cise of which are determined by his residence, are concerne
where he actually, and in point of fact, has his home. A
cannot have a "home," or "residence," in one place, which
be regarded as his family homestead, and a domicile in ano
for political purposes, and for being elected to office, and, perh
a business residence in a third place. He cannot have his d
cile, for social and voting purposes, in a city, and for tax
purposes, in the country, but the one place or the other will be
actual domicile, and will determine his rights. *Thorndike* v.
ton, 1 Met. 245; *Opinion of Justices*, 5 Met. 589; *Shaw* v. *S*
98 Mass. 160; *Abington* v. *Bridgewater*, 23 Pick. 176.

Therefore, if for any purpose, Mr. Mayhew had lost his resid
in Massachusetts by his absence in Connecticut, he had lo
for all purposes, and was not eligible for election as a sen
Mr. Mayhew took up his actual residence in Connecticut for
teen months, using that term in its ordinary and not its l
sense, and the question then recurs, whether, in accordance
the doctrines above expressed, he had such an "intention,
abandoning the old and acquiring the new residence, as to l
lost his domicile in this State. There are two quite distinct cla
of evidence to prove an intention of this kind. In the first pl
all the facts and circumstances of the case are to be taken
consideration. In the second place, the declarations of the pa
not only those which are made at the trial or hearing of the ca
but also those which have been made by him to third persons,
vious thereto, or previous to the commencement of legal proc

ings in the matter, are to be considered, and to have weight in determining the question. The proof is made up of the declarations of intention, with proof of other facts, with which such intent can be connected. *Holmes* v. *Green*, 7 Gray, 300; *Thorndike* v. *Boston*, 1 Met. 243, 247; *Lombard* v. *Oliver*, 7 Allen, 157; *Monson* v. *Palmer*, 8 Allen, 552, and cases; *Reeder* v. *Holcomb*, 105 Mass. 94; *Harvard College* v. *Gore*, 5 Pick. 374; *Lyman* v. *Fiske*, 17 Pick. 234. Counsel for the petitioners laid considerable stress upon the argument, that Mr. Mayhew in fact remained in Connecticut for more than the year during which he originally proposed to stay; that his stay was therefore indefinite, and that a man may acquire a new domicile in a place, if he goes to stay there for an indefinite time, or without an intention to return to his old residence, at a fixed and definite time. But indefiniteness of time, of the proposed stay in a place, is not a test, in itself, of domicile. *Sears* v. *Boston*, 1 Met. 253. "In the present case, there was, at the time of the departure of the plaintiff from Boston, an intention to return and resume his residence in Boston, though at no fixed period, accompanied with circumstances indicating a temporary, and not a permanent, residence in Paris."

There have been an apparent confusion and contradiction in the various decisions of the courts, in regard to the different questions concerning the law of domicile, but this has arisen, not from any difference of opinion, as to the principles of law involved, but from the application of those principles to the peculiar facts of individual cases. As no two cases can be identical, as to facts, so, while the courts may always be guided by the same general principles of law, a wide difference of opinion may result, as to the relation of the law to the particular facts, and one court may deem it proper, in particular cases, to give a very strict construction to the law, as applicable to the facts, while another court may be more liberal in such construction.

It should be remembered, in the consideration of these questions, that the declarations of the party, as to his intention, although entitled to their full weight as competent evidence, are not conclusive, but the acts of the party are also to be taken into account. The "intention" of the party, is not merely what the party may think or believe, but a legal fact to be proved by his acts and declarations. For example, one may positively testify as to his intention of retaining his former domicile, and even may be entirely honest and sincere in thinking he had such intention, yet that might not establish the fact of legal "intention" on his part; for, if all the indications of a homestead being retained are absent, and all the facts point to the new residence as his home; if his

permanent abiding place, his home, his furniture, his relations, his associations, and his family, are in the new place, and he has, in the old place, merely a carpet-bag, in an attic, or an unused room in a boarding-house; in one word, if all the ties to the old place are withdrawn, and all apparent ties bind him to the new place, it would be evident that, under such circumstances, the old domicile is lost. The question may be regarded as whether, to use a military expression, he has "cut himself loose from his base of supplies, and has left no reserve to fall back upon," or has left behind him something to call him back, or to which he may be supposed to cherish the design of returning.

The case of *Holmes* v. *Green* goes, perhaps, as far as any case, towards apparently limiting the meaning of the word "residence," to actual residence in fact; and yet, bearing the last stated doctrine in mind, it is entirely consistent with all the other cases, establishing only the said doctrine, that a "*mere naked declaration of intent to reside in a city or town, from which a party has removed, without any proof of other facts with which such intent can be connected, is not adequate proof of inhabitancy under the Constitution and laws of this Commonwealth.*" The court said, "*all the outward indicia of inhabitancy pointed to Tiverton as his place of residence.*"

Thus there is no foundation for the popular opinion, that a man may elect where he will have his residence and be taxed. His residence is not, necessarily, where he says it is, or elects it to be, but where his home actually is, with the "*indicia*" thereof. *Holmes* v *Green*, 7 Gray, 299. Applying these principles to the facts of this case the committee have no hesitation in coming to the conclusion, that Mr. Mayhew, by his absence in Connecticut, had not lost and abandoned his domicile in Massachusetts, and that his acts and declarations are not only consistent with the theory, that he intended to retain his former residence, but are ample, and to the minds of the committee conclusive, proof of such intention. The committee do not deem it necessary to review all the evidence in the case, and to show how the principles of law are applicable to the different points thereof, as they have stated all the evidence, in considerable detail, in order that the senate may have an opportunity of forming its own conclusions from the facts presented.

This general distinction may be observed, in regard to the evidence presented: that the declarations and acts of Mr. Mayhew, point unmistakably to the conclusion that he retained his residence in Massachusetts, while the greater part of the evidence introduced to prove that such residence was abandoned consists of the acts of third parties, to which acts Mr. Mayhew was not himself a

party, and of which there is no evidence that he had knowledge. Mr. Mayhew's rights could not, of course, be affected by the unauthorized acts of other persons, and, therefore, much of the evidence here reported was irrelevant and incompetent; nevertheless, the committee deemed it best to hear and report it, inasmuch as reliance was placed upon it by the petitioners, and it was deemed proper, not to appear to prejudice their rights by a too strict application of the technical rules of evidence.

As to the acts of Mr. Mayhew, or what the court, in the above quoted case, called the "outward *indicia* of inhabitancy," there can hardly be imagined a case, where, when the actual residence is changed, those acts and "*indicia*" of continuation of the former residence are stronger: his having lived all his life in Charlemont; having his homestead there; his political and social and business relations being there; the retaining of his homestead, as to furniture, and the care of it, and providing for it, and otherwise, unchanged during all his absence; a part of his family (his two sisters) living there all the time; his visiting it frequently, and making repairs upon it, and laying in wood and ice for his future use; his retaining a directorship in the bank there, and an interest in the snathe business; his temporary object in going to Connecticut to make money, and especially to get some advantage in buying cloth; his retaining, and refusing to sell, his business estate, and other real estate, in Charlemont; his retaining his pew in church; his arranging with his partner, before he left, to re-enter into, and his actually re-entering into, the partnership business, and resuming it, as agreed; his selling out nothing but his business with Merrick, when he left, and retaining all his other interests; in short, his retaining his position and interests and surroundings in Charlemont, in all respects unchanged, except as to his selling out, with the right to resume it, his interest in the clothing business, and as to his actually removing to Connecticut, and all other "outward *indicia* of his inhabitancy" being unchanged. Certainly, here the *indications* are sufficient confirmatory evidence, to the declarations of intention. In addition to this "outward" evidence, there are the declarations of Mr. Mayhew; his testimony, in unequivocal terms, at the hearing before the committee, that it was always his intention to retain his residence in Charlemont and to go to Rockville only for a temporary purpose; his making declarations to numerous witnesses before and at the time of going to Rockville, and while in Rockville, that he intended to retain his residence in Charlemont, and was only going temporarily to Connecticut, all which declarations, of course,

could have no reference to the present case; his signing, and making oath to, a declaration that he was a resident of Massachusetts; his refusing to be a bank director in Rockville, because he was not going to stay there, and other declarations, to which it is unnecessary here to refer.

There seems to be here abundant evidence, therefore, not only of intention, as expressed by him, but also of acts, to establish that his residence in Massachusetts continued during his absence in Connecticut.

As to the evidence to establish that he had lost his domicile in Massachusetts, very little of it is of a positive character, and most of it, as has been said, consists of the acts of other persons than Mr. Mayhew. Three deeds in which Mr. Mayhew was described as of Rockville, are made by lawyers without instruction in this respect, from Mr. Mayhew, and even if he had, for purposes of making the deeds, described himself as living in Rockville, that could not be entitled to much weight, in establishing it as his intention to make his legal domicile in that town, as against the other circumstances. The assessors in Rockville wrote him down in their list of resident tax-payers, but Mr. Mayhew did not write the list, and there is no evidence that he saw it. He returned his watch and piano as taxable in Rockville, filling out the printed blank therefor, but it does not appear that it was done with any knowledge or belief that he need not so do, if he was not a resident, or any consideration of that question, and consequently, as evidence of intention, has little effect. His wife joined the church in Rockville, testifying that it was on account of her personal acquaintance with the minister, and that she said to him that she was only going to remain a short time; but this testimony has no weight, since Mr. Mayhew himself did not join the church, and the committee, therefore, do not feel called upon to decide what would have been the consequences, if he had done so, and whether joining the church is incompatible with holding a seat in the senate. His buying a residence in Rockville is, under the circumstances attending the purchase, consistent with his intention to retain his domicile in Charlemont. He did not return a list for taxation to the assessors of Charlemont, but he testified that he had never done so but once, and it is by no means a very rare occurrence for citizens not to return tax lists to the assessors; and, perhaps, if the not returning a list was conclusive evidence of non-residence, a considerable number of the members of the legislature would be obliged to withdraw.

The committee, therefore, upon consideration of all the testi-

mony in the case, and of the principles of law in their judgment applicable thereto, are unanimously of opinion, that Mr. Mayhew was "an inhabitant of this Commonwealth five years, at least, immediately preceding his election."

The committee recommend that the petitioners have leave to withdraw.

[The report of the committee was accepted. S. J., 1876, p. 151.]

HOUSE—COMMITTEE ON ELECTIONS, 1876.

Messrs. ALBERT E. PILLSBURY of Boston, *Chairman;* SOLOMON S. SLEEPER of Cambridge, ALANSON W. WARD of Buckland, JOSEPH T. HARTT, of South Scituate, FRANCIS E. DOWNER of Boston, CHARLES C. CAPRON of Uxbridge, and HERBERT A. DEAN of Berkley.

GEORGE H. SAMPSON *v.* ELEASUR E. WATERMAN.

House Document, No. 4. January 13, 1876. Report by A. E. PILLSBURY, *Chairman.*

[In this case, the petitioner claimed to have been elected representative from the fifth Plymouth district, composed of the towns of Kingston and Duxbury, and alleged an error in the count of votes for representatives in the town of Kingston, and in the official record and return thereof. The committee recounted the votes in that town without reporting their reasons for so doing, and found by the recount that the plurality of the sitting member was increased by one vote. In addition, four votes were found to have been cast for "E. E. Waterman," which, in the unanimous opinion of the committee, should be counted for the sitting member, Eleasur E. Waterman. If so counted, his plurality would be increased by five votes over that officially returned. The committee therefore reported that the petitioner have leave to withdraw. The report was accepted. (H. J., 1876, p. 47.) The report does not state sufficient facts to make it of value as a precedent.]

MICHAEL BARR ET AL., PETITIONERS.

House Document, No. 13. January 19, 1876. Report by A. E. PILLSBURY, *Chairman.*

Official Returns of Election. Presumption of Correctness. The official returns of an election are *prima facie* correct, and the burden of proof is upon the petitioners, to show fraud or mistake.

Same. Fraud in the Returns. Proof of wilful irregularity, or fraud on the part of returning officers, will invalidate their return, by depriving their official acts of the credit to which they are otherwise entitled.

Same. Evidence to impeach Returns. The election return cannot be set aside, or the declared result of the election avoided, by proof that persons entitled to vote were denied the right to do so, unless the ward officers, in denying such persons the right to vote, acted dishonestly or collusively, or unless it be proved that such votes would have been cast against the sitting members, and would have changed the declared result.

Same. The return cannot be set aside, or the declared result of the election avoided, by proof that votes were cast by persons not entitled to vote, unless the officers, in receiving such votes, acted dishonestly or collusively, or unless it be proved that such votes were cast for the sitting members, and that the rejection of them would have changed the declared result.

Same. The fact that the number of ballots did not exactly correspond with the number of names checked on the voting list; that persons, whose names were checked, were denied the right to vote; that persons were, after refusal to receive their votes, allowed to vote upon presenting written statements from the registrars of voters (it not appearing what such statements contained); that a person not an election officer was admitted behind the rail (it not appearing that he was there without right, or for an improper purpose), are not sufficient to prove wilful irregularity, or fraud on the part of the election officers, or to avoid the election return.

A. C. DALY *for petitioners.*

MICHAEL CARNEY *for sitting-members.*

The Committee on Elections to whom was referred the petition of Michael Barr, William Taylor and Anthony C. Daly, that the election of representatives in the second Suffolk district be declared null and void, and a new election ordered, having met the petitioners, and the sitting members, and heard their statements, evidence and arguments, submit the following report:

The petition alleged, —

1. That the election was conducted in a loose and improper manner, thereby opening the door to collusion and fraud.

2. That a number of citizens whose names were upon the voting list, were denied the right to vote, their names having already been voted upon by other persons.

3. That there were more votes cast than names checked on the voting list.

4. That the names of certain persons were checked, as having voted, such persons having been absent from the city on the day of election.

The committee held, and announced to the parties, that the investigation would be governed by the following rules which are too familiar to require a citation of authorities.

That the official returns are *prima facie* correct, and the burden of proof is upon the petitioners to show the alleged fraud or mistake.

That proof of wilful irregularity, or fraud on the part of the returning officers, will invalidate their return, by depriving their official acts of the credit to which they are otherwise entitled.

That the return cannot be set aside, or the declared result of the election avoided, by proof that persons entitled to vote, were denied the right so to do, unless the ward officers in denying such persons the right to vote, acted dishonestly or collusively, or unless it be proved that such votes would have been cast against the sitting members, and would have changed the declared result.

That the return cannot be set aside, or the declared result of the election avoided, by proof that votes were cast by persons not entitled to vote, unless the ward officers, in receiving such votes, acted dishonestly or collusively, or unless it be proved that such votes were cast for the sitting members, and that the rejection of them would have changed the declared result.*

The petitioners expressly admitted that they were unable to prove for whom the votes, alleged to have been improperly rejected, would have been cast, or for whom those improperly received were in fact cast, and that they did not claim that the declared result would have been changed by the reception of the former or the rejection of the latter class of votes. It was not claimed, that the

* [NOTE BY THE EDITORS. The above rulings of the committee, are in accordance with the decisions of the supreme judicial court. In *First Parish, etc.*, v. *Stearns*, 21 Pick. 148, the court held, in 1838, that it was not a valid objection to an election, that illegal votes were received, if they did not change the majority,—Mr. Justice *Morton* saying: "It is no objection to an election, that illegal votes were received, unless the illegal votes changed the majority. The mere fact of their existence never avoids an election. This is so plain a proposition, that it needs no authority to support it. It is the principle adopted, and acted upon, in all cases of contested elections, whether in the British Parliament, the Congress of the United States, the legislature of this or any other of the United States. The burden of proof, too, is always upon the persons contesting the election" (pp. 154, 155). That decision was affirmed in *Trustees of School District* v. *Gibbs*, 2 Cush. 39, and *Wardens of Christ Church* v. *Pope*, 8 Gray, 140. Judge *Cooley* says:—"The admission of illegal votes, at an election, will not necessarily defeat it, but to warrant its being set aside on that ground, it should appear, that the result would have been different, had they been excluded." Constitutional Limitations (4th ed.), p. 782, and see cases there cited. McCrary Elections, § 444.]

whole number of votes, improperly received or rejected, could be shown to exceed twenty, and it was admitted that, upon the ward officers' count, and also upon the recount of votes by the board of aldermen of Boston, subsequent to the election, each of the sitting members was found, and declared, to have received a plurality of much more than twenty votes over either of the petitioners.

The committee thereupon held that the petitioners in presenting their case should be confined to evidence tending to show fraud, collusion, or irregularity, on the part of the ward officers.

Under this ruling, the petitioners offered evidence, tending to show that, upon the recount of votes by the board of aldermen, the number of ballots was found to exceed the number of names checked on the voting list, by fourteen or thereabouts; that several of the ward officers left the ward-room at various times during the day; that the clerk wore a heavy overcoat, although the ward-room was quite warm; that a motion was addressed to the warden, that the clerk be required to remove his overcoat, which the warden did not receive, saying, that if the clerk wished to wear his overcoat, he could do so; that a person bearing a ballot for the sitting members was challenged, but was allowed to deposit his vote after the warden had endorsed it; that about fifteen persons were denied the right to vote, for the reason that their names were already checked as having been voted upon; that the clerk in counting ballots stood in such a position that persons outside the rail could not see the motions of his hands; that after the polls were closed, a person, not an officer of the ward, was seen behind the rail; that the attention of the police and of the warden, was called to the fact, and that the warden spoke to the person, but did not remove him, and that a police officer said he was a reporter and had a right to be there; that several persons, not exceeding sixteen, who were at first denied the right to vote, for the reason that their names were already checked, went to the office of the registrars of voters, and returned with written papers (the contents of which did not appear), upon reading which, the warden allowed them to deposit their votes; that one person bearing a ballot against the sitting members, was refused the right to vote, as his name was already checked; that he went to the registrars' office, but was unable to obtain any certificate, and on his return, was again refused the right to vote.

The warden testified that, although he required voters to deposit their votes, open and unfolded, several persons in the course of the balloting, deposited folded ballots, notwithstanding his efforts to prevent it; that almost invariably, in such cases, he immediately took the ballot out of the box, opened it sufficiently to see that it

was a single ballot, and returned it into the box; and that he thought the number of persons allowed to vote on registrars' certificates, as aforesaid, was from ten to sixteen, most of them in the afternoon.

In the foregoing facts, the committee are unable to find proof of wilful irregularity, or fraud, on the part of the ward officers. That the number of ballots did not exactly correspond with the number of names checked, may be due to an innocent mistake, or omission in checking, or to the fraud of a person outside the rail, without collusion of the ward officers. There is no evidence tending to show that they had any agency in it. In denying the right to vote to persons whose names were already checked, the warden only performed his duty; and the fact that he afterwards allowed them to vote, upon written statements from the registrars, it not being shown what those statements were, is no evidence of fraud. It is not shown, that the person alleged to have been improperly behind the rail, had no right to be there, or that he was there for any improper purpose, or that the officers, in allowing him there, were actuated by any improper motive. The other evidence requires no special notice.

The committee find that the allegations of the petition are not sustained, and recommend that the petitioners have leave to withdraw.

[The report of the committee was accepted. H. J., 1876, p. 65.]

JOHN C. STIMPSON *v.* AMOS F. BREED.

House Document, No. 30. January 27, 1876. Report by A. E. PILLSBURY, *Chairman.*

Recount of Votes refused. The fact that the original declaration of the vote for representative of a ward, made by the warden at the close of the polls, was erroneous, and that, thereupon, the ward officers immediately recounted the votes, finding seven more for the sitting member, and one less for the petitioner, than declared, and verified the recount by another count, is insufficient ground for a recount of votes, by the house of representatives.

Same. Evidence that the same ward officers, at the subsequent municipal election, made several errors in counting the votes for city officers, is of doubtful admissibility, and even if the fact is proved, is insufficient ground for a recount of votes for representative.

Failure of Clerks to meet to compare Transcripts within Time required. The p visions of the statute, regarding the meeting of clerks to examine and comp transcripts, and ascertain what persons have been elected, should be strictly co plied with, and the authority of such clerks, to make out a certificate of electi expires with the time prescribed by statute for so doing.

Same. Such Failure invalidates Certificate of Election. The fact that such cle did not meet, to examine and compare transcripts, until two days after the expirat of the time prescribed by statute, no unavoidable accident or emergency preventin meeting within that time, while not invalidating the election, will invalidate t return, and certificate of the clerks, made at such delayed meeting.

Ascertainment of Result, when Certificate is invalid. Where the return, and c tificate of the election by the clerks, are invalid, and set aside, the election will n be avoided, if the true result can be ascertained, independently of the defective rec and return; and, to ascertain that result, the ballots cast for representative, havi been properly preserved, were recounted.

Petition, Evidence competent under. Evidence of irregularity in the election, in the return, or ascertainment of the result, will be considered, although su irregularity is not expressly alleged in the petition.

E. K. PHILLIPS *for petitioner.*

The Committee on Elections to whom was referred the petiti of John C. Stimpson for the seat as representative from t eighteenth Essex district, now occupied by Amos F. Breed of Lyn having met the parties, and heard their evidence and the argumer of counsel, submit the following report: The petitioner claimed have been duly chosen representative from said district, a prayed for a recount of the votes cast therein, alleging that seve varying declarations of the vote were made in ward 3, in the c of Lynn (which ward, with the town of Swampscott, constitut said district), and that the final declaration did not correctly rep sent the true vote of the ward. The other allegations of the pe tion were waived.

The evidence tended to show that the declaration of the v for representative, made by the warden of said ward immediat after closing the polls, was erroneous. The ward officers recount the ballots immediately after said declaration, and found seven m votes for the sitting member, and one less for the petitioner, th had been declared. Thereupon, another recount was had of t votes for these two candidates (no discrepancy between the fi and second counts having been discovered as to the others), t result of which confirmed the second count, and this was the res finally declared. The sitting member appeared to have 243 vot and the petitioner 116. It was admitted that the comparison the vote of the two precincts showed a plurality of eleven in t district for the sitting member.

The evidence tended to show, also, that following the state el tion the municipal election was held in Lynn in December. At t time the same persons were in office in ward 3, and several errors

the ward officers' count were discovered, upon a recount by the board of aldermen. This evidence was of doubtful admissibility, but the committee saw fit to receive it.

The committee were of opinion, that upon the foregoing evidence, the petitioner was not entitled to a recount. It is well settled, that the fact of a close vote, or that slight mistakes are made in counting, apparently insufficient to affect the result, will not justify a recount. *Greene* v. *Bridgman*, *ante*, p. 216; *Slate* v. *Green*, *ante*, p. 226; *Taylor* v. *Carney*, *ante*, p. 228.

It appeared incidentally, however, that the clerks of the two precincts, composing the district, did not meet to make up their return and certificates as required by law. The act of 1874, chap. 376, sects. 27, 28, 30,* is as follows: —

SECT. 27. The clerks of cities, towns and wards, composing such districts, shall meet at noon, on the day following an election for representatives, at the place so designated, and shall examine and compare such transcripts, and ascertain what persons have been elected. If any error appears, in a transcript or return, the clerks shall forthwith give notice thereof, to the officers required to make the return, and such officers shall forthwith, in conformity with the truth, and under oath, make a new return, which, whether made with or without such notice, shall be received and examined by said clerks, within two days after the time appointed for the meeting; and, for that purpose, the meeting may be adjourned not exceeding two days. No return shall be rejected, when the number of votes given for each candidate can be ascertained.

SECT 28. Such clerks shall, at such meeting, make out, under their hands, a complete return of the names of all persons, for whom votes were given in the district, and the number of votes for each person, and a record of the return shall be made, in the book of records of their respective cities, towns and wards, within four days after the day of the meeting.

SECT. 30. When the clerks of cities, towns and wards, composing a district, at their meeting for the purpose, ascertain that a representative is elected, in their district, they, or a majority of them, shall make out duplicate certificates thereof, one of which they shall deliver into the office of the secretary of the Commonwealth, on or before the 1st day of January following, and the other, by a constable, or other authorized officer, transmit to the person elected, within ten days after the day of election.

The day of election was Tuesday, Nov. 2, 1875. It appeared, that the clerks had no meeting in their official capacity, or for the transaction of any business, until Thursday evening, at which time they met at the store of Mr. Holden, town clerk of Swampscott, and the return and certificates were then and there made out.

* Substantially Pub. Stats, chap. 8, sects. 10, 12, 14.

There was nothing to prevent the meeting of the clerks at t time and place required by the statute, except that the clerk of wa 3, in Lynn, was not aware of the requirement.

It did not clearly appear that any place of meeting had be been designated, under the act of 1874, sect. 26, or Gen. Stat chap. 8, sect. 11,* but the evidence showed, that for several yea with possibly a single exception, the clerks had met at the to hall in Swampscott.

As this irregularity was not directly stated in the petition, t question arose, whether it should be considered. No objection w made thereto, and, the evidence being before them, the committ held that they were bound to consider it, and give it such effect the law requires. Legislative bodies, in the performance of su judicial functions as belong to them, are not bound by the rules pleading or evidence, except as they see fit; and the general opi ion is, that investigations of this character, in which not only t parties, but the constituency, and indeed the entire Commonwealt have an interest, should be conducted liberally, and by such rul as will on the one hand, afford no protection to irregularity fraud, by which the will of the people may be defeated, nor on t other, permit the acts of sworn officers to be set aside without go cause. In *Sharon*, Cushing, S. & J. Cont. Elec. Cases, 502, t house held that evidence of a fact not alleged in the petition shou not be received, but this decision has not been followed. *Palm* v. *Howe*, *ante*, p. 145; *Pease* v. *Rowell*, *ante*, p. 108; Mass. Ele tion Cases, Cushing, S. & J., 545.

The committee being of opinion that the irregularity of t clerks would not necessarily invalidate the election, the questi to be determined was, of its effect upon the return and certificat This question, which is of some importance, was argued by cou sel and has been carefully considered.

If the provisions of section 27 are mandatory, it seems th they can be satisfied only by strict compliance, and that a dire violation of them will avoid the acts of officers so offendin *Dwarris on Statutes*, 610, 611; *Cush. Parl. Law*, § 201. It unnecessary to consider what the result would be, in case the of cers were prevented by unavoidable accident or emergency fro complying with the law, for the fact here was otherwise.

The phraseology of the section, which is one element in th interpretation of statutes, certainly indicates that the legislatu intended to require strict compliance, and not merely to indicate course which might be pursued or not at the pleasure of th

* Substantially Pub. Stats., chap. 8, sect. 9.

officers. The clerks "shall" meet at noon, of the day following the election, and "shall" examine and compare, etc. If any error appears, they "shall forthwith" give notice to the returning officers, who "shall forthwith" make a new return, which "shall be received and examined, by said clerks, within two days after the time appointed for the meeting; and, for that purpose the meeting may be adjourned not exceeding two days." Then, apparently, the authority to make a return and certificate expires. The purpose, evidently, is to require the result of the election to be speedily ascertained and published, so that all persons concerned may know the result. There are obvious reasons for this requirement. To delay the ascertainment and declaration of the result of an election always offers an opportunity to fraud; and the statute affords abundant internal evidence, that the legislature had this in mind, and intended to erect an impassable barrier against it. If the clerks, through their own ignorance or caprice, can postpone their meeting until a day beyond the time limited by law, it is difficult to see why they cannot postpone it for a week or a month; — the difference being only in degree. One result of this would be, that the person elected could not be officially notified of the fact, within ten days as the law requires, and perhaps not in season to take his seat at the opening of the session; and another, that in case no choice was effected at the election, the district, through failure of the clerks to certify the fact at the proper time, might be deprived partially, if not wholly, of its right of representation in the succeeding legislature. See Stats. 1874, chap. 376, sects. 30, 32, 33. A careful examination of the whole statute will disclose that, while certain provisions are manifestly directory, the language of all the sections relating to the ascertainment, declaration, record and return of the result of elections, is such as to indicate the intent of the legislature, that all these provisions should be strictly complied with.

In *Haskell* v. *Closson*, *ante*, p. 233, the committee held that the provisions of the same statute, relating to the preservation of ballots and check-lists, are peremptory. These sections (sects. 40–44) are similar in phraseology to that now under consideration, and every reason for construing them as peremptory seems also to apply here. It was also held, that the time for "forwarding returns, or declaring the results of an election," expires with the meeting of the clerks at noon of the day following the election, or with the adjourned meeting, held within two days, if such adjournment is had. The report was recommitted, at the suggestion of the committee, for the purpose of a recount, but the house seems to have assented to the doctrine. *Davis* v. *Murphy*, *ante*,

p. 177, is to the same effect, and tends to show that, in the opi ion of the house at that time, the Stats. of 1863, chap. 144, sec 2, of which section 41, of the present statute, is a re-enactmen should be considered mandatory, and that acts done in violatio of it are void. The same construction has frequently been pu upon other statutes *in pari materia*. *Easthampton*, Mass. Ele tion Cases, Cushing, S. & J., 471; *Dana*, *Id.*, 551; *Burlington Id.*, 460; *Charlestown*, *Id.*, 518. In these cases, it is held tha statutes, similar to the act of 1874 in scope and phraseology must be strictly construed, and that failure to comply with thei provisions, will avoid the acts of the returning officers, and i some cases invalidate the election.

The sitting member cited *Lunesborough and New Ashford*, Mas Election Cases, Cushing, S. & J., 191; *Holliston*, *Id.*, 297; *Be chertown*, *Id.*, 421; *Freeman's case*, *Id.*, 547; *Townsend's cas Id.*, 642; *Plympton*, *Id.*, 643; and *Com.* v. *Ayer et als.*, *Id.*, 674 Without entering into a critical examination of these cases, it i sufficient to say, that no one of them is directly in point, and tha they tend principally to the conclusion that an irregularity, lik that in question, does not invalidate an election, if the true resul can by any means be ascertained, but that its effect, if any, is t invalidate the return.

The committee were of opinion that the house ought not t sanction a direct and palpable violation of the provisions of thi statute, nor establish a precedent that may hereafter afford a cover to fraud. It is apparent that sound policy, and a due regard to the safety and purity of elections, alike demand that the require ments of so important a statute be strictly and literally obeyed

The committee have not been influenced, however, by any con sideration of what may occur hereafter, but have endeavored t base their judgment entirely upon sound principles of construc tion, and the weight of authority. And they were unanimously o opinion, that the return and certificate made under the circum stances above stated, in direct disregard of the provisions of a peremptory statute, are invalid, and must be set aside.*

* [NOTE BY THE EDITORS. *Distinction between Irregularities in the Action o Election Officers and Want of Jurisdiction to act.* The above case, and the cas of *Haynes* v. *Hillis*, House, 1877, and *Hillman* v. *Flanders*, House, 1880, report *post*, are to be distinguished from *Johnson* v. *Cole*, *ante*, p. 36, *Beck* v. *Plummer*, a p. 40, *Newcomb* v. *Holmes*, *ante*, p. 57, *Tobey* v. *King*, *ante*, p. 60, and similar cas in which it was held, that mere irregularities in the conduct of the election, or in manner of making the transcript or return, not affecting the result, or raising a presumption of fraud, will not invalidate the election. It is thoroughly settled innumerable decisions of the courts that such irregularities are immaterial, unl the result of the election is changed by them. *Ex parte Strong*, 20 Pick. 484. C

As the rule is well established, that an election shall not be avoided if the true result can be ascertained, independently of the

monwealth v. *Smith*, 132 Mass. 289; Cooley Constitutional Limitations (4th ed.), p. 778; McCrary Elections, §§ 122-129, and cases there cited.

But in the above case, and the subsequent cases cited above, the question was not one of irregularity in the manner of the performance of their duties by election officers, but whether the time limited by statute for preparing a certificate of election, which should be the official and best evidence of the result, having expired, a certificate made subsequently should be regarded as official. The committee did not recommend the avoidance of an election, or a return, on account of any irregularity in its conduct or form, but refused to regard as official a certificate of election given by officers who, at the time of meeting, might be said to have had no statutory authority to make it. In other words, the question was not of *irregularity* in their action, but of *jurisdiction* at the time to act officially at all.

Certificate is prima facie Evidence of Election only when Official. The official certificate of election is conclusive evidence of the fact, in any collateral proceeding, and *prima facie* evidence in a proceeding, like an election controversy, to try the title to the office. It entitles the holder to be qualified for the office, and, as *prima facie* evidence of title to it, confers the right of office upon him, until that right is impeached in an election controversy. McCrary, Elections, §§ 219-223; Cooley Constitutional Limitations (4th ed.), p. 789; *Commonwealth* v. *Smith*, 132 Mass. 289; *Kerr* v. *Trego*, 47 Penn. St. 292; *Hadley* v. *Albany*, 33 N. Y. 603; *Hartt* v. *Harvey*, 32 Barb. (N. Y.) 55; *People* v. *Miller*, 16 Mich. 56. But to have this important effect, the certificate must be *official;* that is, given by officers authorized by law to make it. The only authority to make it is conferred by statute. The clerks of towns, in comparing transcripts of returns of votes, and certifying the result of the election, have no other authority or jurisdiction than that given by the statutes referred to in the above report. "It cannot be necessary to prove that a ministerial officer can do no valid act, but what he is, either expressly or by necessary implication, authorized to do." *Vose* v. *Deane*, 7 Mass. 280, 282. Where a statute, conferring authority upon clerks to ascertain the result of the election, and issue a certificate to the person elected as representative, expressly states and limits the time within which such action must be taken, any action, on their part, after that time has expired, is outside of the statute authority, and consequently unofficial. The principle is stated in Potter's Dwarris on Statutes, p. 224, note: -- "In all cases . . . where the authority to proceed is conferred by statute, and *where the manner of obtaining jurisdiction is prescribed by the statute* . . . the mode of proceeding directed, is mandatory and must be strictly complied with, or the proceeding will be utterly void. The true distinction is this: Where the provision of the statute is the *essence* of the thing required to be done, and *by which jurisdiction to do it is obtained*, it is mandatory; otherwise, when it relates to form and manner, and when an act is incident, or after jurisdiction has been obtained, it is directory." And see Sedgwick Construction of Statutes, pp. 329-331; *Macy* v. *Raymond*, 9 Pick. 285. So, in Michigan, the court *held* that a count not made under the authority of the statute was not presumptive evidence of the result of the election, but was void, — Judge Campbell saying: "For purposes of convenience, the law has provided that the action of the inspectors, when conforming to the statute, shall stand as presumptive evidence of their contents. But evidence by the count of any one, not made officially . . . would be hearsay at best. It would be contrary to public policy to allow any evidence whatever, based upon a counting made in direct violation of law, to be received at all. The object of the statute is to prevent tampering with the ballots, and inasmuch as it would be impossible to determine with certainty, whether any fraud had been committed in any unauthorized counting, there can be no propriety in allowing any evidence resting on it." *Keeler* v. *Robertson*, 27 Mich. 116, 129. The case is somewhat similar to those involving the right of assessors to make an assessment, after the expiration of the time provided by law. In the opinion of the justices of the supreme court,

defective record or return, the committee, upon coming to the above conclusion, proceeded to recount the ballots cast for repre-

that assessors, after the general assessment of a tax, had no power to assess a tax on a person in order to qualify him to vote, the justices observe the distinction between mere irregularity in the assessment of a tax, and want of authority to assess it. "This distinction, we think, is manifest. In the one case, the tax is an actual tax, although it may be informal, irregular, and even illegal, and of which, perhaps, he might avoid the payment, should he elect to contest it; in the other, it is a mere semblance of a tax, purporting to be assessed, by persons wholly unauthorized, and thus is a proceeding utterly void, and from which no right can be derived." *Opinion of Justices*, 18 Pick. 575, 578. And see *Eames* v. *Johnson*, 4 All. 382; *Torrey* v. *Millbury*, 21 Pick. 64. So, in *Davis* v. *Murphy*, *ante*, p. 177, and *Haskell* v. *Closson*, *ante*, p. 233, the house of representatives *held*, that the aldermen had no authority to recount votes, after the expiration of the time provided by statute for such recount.

Place of Meeting of the Clerks not essential to the Validity of their Action. If, however, the clerks meet within the time fixed by law, so that they have jurisdiction to act officially, any irregularities in their manner or place of acting, should be regarded like other mere irregularities in election proceedings, and would not necessarily invalidate their action. So, it has been *held*, that the meeting, at a place not designated, is an irregularity, but if held within the required time, in the absence of fraud, or proof that the result was affected, will not invalidate the proceeding, where "the duties of the return judges were so interfered with by a disorderly crowd, that they could not be performed at the usual place." *Hulseman* v. *Rems*, 41 Penn. St. 396. In *McCraw* v. *Harralson*, 4 Coldwell (Tenn.), 34, it was decided, that "where the returns of the election were made to the court house, where the law required that they should be counted, but the court being in session, the votes were counted in a private house in the town, this was a sufficient compliance with the requirement of the statute, and constitutes no ground, in the absence of fraud or misconduct in comparing the polls and counting the votes, for setting aside the election." In *Tobey* v. *King*, *ante*, p 60, the house of representatives *held*, that the meeting of the clerks, in a place other than that designated, while unjustifiable, would not, unless the result of the election was thereby affected, invalidate their action.

Invalidating the Certificate will not affect the Election if the Result can be ascertained by other Means. If the proper officers neglect to make the required certificate, or fail to make it, as required by statute, so that it is invalid, the election is not necessarily affected by the neglect. There is, merely, no official evidence of the result of the election, — and that the popular will may not be defeated, or any person deprived of his rights, the result will be ascertained, if possible, by other evidence. As stated by Judge *McCrary*, in reporting for the committee in the election controversy in Congress of *McKenzie* v. *Braxton*, Smith Cong. Election Cases, pp. 19, 25: "Of course, the returns of an election must be certified by the proper officers. If not so certified they prove nothing, and when offered in evidence, if objected to, they must be rejected. It does not, however, necessarily follow that the vote cast at such an election is lost, or thrown away. An uncertified return does not *prove* what the vote was, — that is all. The duly certified return is the best evidence, but if it be shown that this does not exist, we doubt not, secondary evidence would be admissible to prove the actual state of the vote. The failure of an officer, either by mistake or design, to certify a return, should not be allowed to nullify an election, or to change a result, if other and sufficient and satisfactory evidence is forthcoming to show what the vote actually was." And see, McCrary Elections, § 171; Cooley Constitutional Limitations (4th ed), p. 789. In the case of *Haynes* v. *Hillis*, House, 1877, *post*, the committee considered that, under such circumstances, the certificate being invalidated, the best evidence of the result remaining, was the town record of the vote, rather than the ballots. That is, the committee did, what the clerks ought to have done, within the statute time, canvassed not the *votes*, but the *record* of the votes. And this course seems to be approved by Chief Justice Shaw,

sentative in said district, which were proved to have been properly sealed and preserved, and which were produced before the committee, by the officers to whom their custody belongs; and the result, which was as follows, showed that the sitting member received, in the district, a plurality of eleven votes over the petitioner: —

In Swampscott:

Amos F. Breed had	27 votes.
John C. Stimpson had	143 "
Samuel C. Pitman had	77 "
Abel Curtis had	2 " .

In *Ex parte Strong*, 20 Pick. 484, who says: "If no return, or an imperfect one, be received, let it be supplied, or corrected, by a reference to the original record, if any there be" (p. 492.) In Congress, when there is no valid certificate of an election, the practice is, to go to the returns upon which the certificate should have been based. "The failure or refusal of the proper officer to issue a certificate of election, would only render it necessary for the house to go back to the returns and poll-books, and ascertain, if possible, from them, or from any competent and sufficient evidence, who was actually elected, and award the seat accordingly," says Judge *McCrary*, in the report in *Boyden* v. *Shober*, 2 Bart. Cong. Election Cases, 904, 906. And see, *Spaulding* v. *Mead*, Clark & Hall Cong. Election Cases, 157; *Richards' Case*, *Ib.*, 95; *Clements' Case*, 1 Bart. Cong. Election Cases, 366; *Giddings* v. *Clark*, Smith Cong. Election Cases, 91. It is to be remembered, however, that until recently in Massachusetts, and to the present time, in most of the states, ballots were not preserved, so that the only evidence of the election, back of the certificate, was the return or record. If the certificate be regarded as the *primary* evidence of the result, in its absence, from invalidity, *secondary* evidence is necessary to prove the result of the election. And, as there are no degrees in *secondary* evidence, recognized in Massachusetts, any evidence tending to prove who, in fact, was elected, may be admitted. "When the source of original evidence is exhausted, and resort is properly had to secondary proof . . . (the fact) may be proved, like any other fact, by indirect evidence. The admissibility of evidence, offered for this purpose, must depend upon its legitimate tendency, to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof. The jury will judge of its weight, and may give due consideration to the fact, that a less satisfactory form of proof is offered, while a more satisfactory one exists, and is withheld, or not produced, when it might have been readily obtained. But there are no degrees of legal distinction in this class of evidence;" — Mr. Justice Wells, in *Goodrich* v. *Weston*, 102 Mass. 362, 364; *Stetson* v. *Gulliver*, 2 Cush. 494. The committee had, therefore, the right to determine, as they did, what evidence should be received to prove the result of the election, the record of the votes in each town, or the votes themselves. The question was addressed to their discretion, which of the two kinds of evidence was entitled to most weight, in proving the fact. While it is for the committee to determine, under the circumstances of each case, which is the better evidence of the result, the safer course as a general rule would seem to be, to resort to the town records of the vote from which the certificate should have been made, rather than to the ballots cast in the election. To recount the ballots, merely because the certificate is unofficial and void, is not only to do what the clerks in making the certificate had no authority to do, but makes the ascertainment of the result depend upon the proper and honest preservation of ballots, while an official record exists in each town, made at the time of the election, from which the result can easily be ascertained.]

In Ward 3, Lynn:

Amos F. Breed had	243 votes
John C. Stimpson had	116 "
Samuel C. Pitman had	177 "
Abel Curtis had	4 "

Total Vote of the District:

Amos F. Breed,	27
John C. Stimpson,	25
Samuel C. Pitman,	25
Abel Curtis,	6

The committee, therefore, recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1876, p. 102.]

Edward J. Jenkins *v.* George A. Shaw.

House Document, No. 58. February 9, 1876. Report by A. E. Pillsbury, *Chairman.*

Eligibility of Representative. Inhabitancy. A person is an inhabitant, within the meaning of the Constitution in prescribing the qualifications of members of the legislature, of that place where he actually dwells, or has his home; and whether he intends so or not, he cannot have a domicile for political purposes in one place, and his actual home in another place.

Same. Intention. If a person leaves one place of residence, and becomes an actual resident in another place, and such latter residence is not, in fact, temporary, the latter place becomes his domicile, and his political rights and duties attach to him there, whether he so intends or not.

Same. A change of domicile does not depend so much upon the intention to remain in the new place, for a definite or indefinite period, as upon the fact that it is without a definite intention to return; and even an intention to return at a remote or indefinite period may be controlled by other circumstances, establishing the fact of domicile in the new place.

Same. The intention to remain, is to be distinguished from mere declaration of such intention; as *intention* is a fact to be proved by evidence, but *declaration of intention* is merely evidence tending to prove such fact, liable always to be controlled by other evidence, and being but one element in determining the fact, and where the acts of the person are inconsistent with his declarations, the intention must be ascertained as a fact, upon the whole evidence.

Same. Evidence. Where a person removed his family in 1867, from ward 5, Boston, from which ward he was elected a representative in 1875, and lived in Brookline, Mass., with relatives for six years and afterwards stayed for a time in

Melrose, and from June, 1874, lived continuously with his family in a house in Dorchester, leased by his mother-in-law, although he always intended to retain his domicile in ward 5 for political purposes, and, to carry out this intention, slept in a hotel, or lodging-house there, April 30, 1874, and occasionally after that, leaving a portmanteau there for some months, and had himself assessed, and his name placed on the voting list in that ward, and on April 30, 1875, again slept in that house, saying to the landlord that he intended to continue his residence there; and in June, 1875, took a room in another place in that ward, retaining the key, but keeping no luggage or effects in the room, and not occupying it for more than one or two nights, it was *held*, that he had ceased to be an inhabitant of that ward, and was ineligible to election from it.

Same. The fact that a person is assessed, as resident of a ward, is entitled to little, if any, weight, on the question of his residence, where the assessors are accustomed to assess persons as residents of the ward in which they claim to reside, or in which the assessors are told such persons reside, and to make no further inquiry as to their residence.

Practice. Petition for Seat by ineligible Person. Action can be taken, upon a petition for a seat as representative, alleging the ineligibility of the sitting member, although the contestant is himself ineligible to the office.

CHARLES J. BROOKS *for petitioner.*
BENJAMIN DEAN *for sitting member.*

The Committee on Elections, to whom was referred the petition of Edward J. Jenkins, for the seat as representative from the fifth Suffolk district, now held by George A. Shaw, having met the petitioner and the sitting member, and heard their evidence, and the arguments of counsel, submit the following report:

The petition alleged that, at the time of the election, and for one year next preceding, Mr. Shaw was not, and had not been, an inhabitant of the district for which he was chosen, and that the petitioner received the next highest number of votes at said election; and prayed that the seat be declared vacant, and that it be given to the petitioner.

From the testimony of numerous witnesses which the committee deem it unnecessary to state in detail, the following facts appeared: —

At the time of the election, — Nov. 2, 1875, — ward 5, in the city of Boston, constituted the fifth Suffolk representative district. That ward was established in 1865, part of the territory then incorporated into it having been previously included in ward 8. The boundary lines, established in 1865, continued the same until a time subsequent to the election of Nov. 2, 1875, and prior to the city election held Dec. 14, 1875. When the new division of wards was made, part of the territory of ward 5 was incorporated into the ward now numbered 12. Mr. Shaw has been assessed and has paid a poll and personal property tax in some part of Boston continuously since 1839; and since the establishment of ward 5, in 1865, he has been assessed and registered as a voter,

in that ward. Prior to that time he was for several years assessed in ward 8, as a resident of the same territory afterward incorporated into ward 5. He was never assessed or registered in ward 16, the place of his alleged actual residence during the year preceding the election. He was a representative from ward 8, in 1859 and 1860; senator from the district composed of wards 8, 9 and 10, in 1861 and 1863; representative from ward 5, in 1866, 1872 and 1874; and a member of the common council of the city of Boston, from ward 5, in 1873, 1874 and 1875. He was also returned as elected to that body, from the new ward 12, in December 1875. In 1873, his seat in the council was unsuccessfully contested for non-residence; and a similar contest upon the same ground is now pending in that body. He has uniformly claimed, and frequently declared, his legal residence or domicile to be in ward 5, from its creation in 1865, to the time of the state election in 1875, mingling actively in the political affairs of that ward, and voting there at nearly every election during that period. Several past and present members of the board of assessors testified that their custom has been, to assess a person as a resident of the ward in which he claimed to reside, or in which they might be told that he resided; and that, having ascertained the fact in this manner, they made no further inquiry as to his place of residence. It appeared, also, that persons are registered as voters, if at all, in the wards in which they are assessed. It did not clearly appear whether Mr. Shaw ever had an actual place of residence in ward 5, although it was admitted that he once had a legal domicile there which involves the fact of residence.

He has a family, consisting of his wife, a son and a daughter. Neither of his children is married, and both live with their parents. From 1866, or thereabouts, until 1873, his family was "temporarily staying in Brookline" (to use his own language) at the house of Mr. and Mrs. Sawin, the father and mother of Mrs. Shaw. Mr. Shaw testified that they were in feeble health, and needed the care and assistance of his wife. During their stay in Brookline, Mr. Sawin died. In 1873, Mr. Shaw's family and Mrs. Sawin were "temporarily staying" in Melrose. It did not appear what Mr. Shaw's actual place of residence was, or whether he was apart from his family during this period.

On the 30th day of April, 1874, Mr. Shaw, accompanied by his son, went to a hotel or lodging-house kept by one, Atwood, in Hayward Place, in ward 5, and engaged a room for the night, saying to Atwood, that he desired to make his residence there, and telling him, if the assessors came and inquired, to say that he resided there. He had with him a small portmanteau, but no other lug-

gage. He passed the night there, occupying the same room with his son. The son passed two or three succeeding nights at this house, and, during the month of May, Mr. Shaw passed two or three nights there not in succession. It did not appear whether he even took any meals there. The portmanteau was found, locked in a closet, some time subsequent to June. Mr. Shaw was in the house, in the language of a witness, "sometimes a week, sometimes once a week, and sometimes less," during some part of 1874, paying for such time as he occupied a room; but it did not appear that he was ever there in November, or subsequently, until as hereafter stated. No member of Mr. Shaw's family was ever in the house except his son as aforesaid.

About the first of June, 1874, Mr. Shaw negotiated with one Newhall, for a lease of a house in Wales Street in ward 16, known as the Dorchester district, saying that he intended to go out there to live. They failed to agree on terms. Mr. Shaw suggested to Newhall that, as he was a member of the city government, his influence might be valuable in that neighborhood; but the negotiation failed. About the same time, or immediately afterward, Mr. Shaw's family, with Mrs. Sawin and her son, Francis R. Sawin, removed to a house on said Wales Street near the one negotiated for with Newhall, where they have since continuously resided. The house was leased by the owner to Mrs. Sawin, for three years from June 1, 1874. It was not shown by whom the rent has been paid. Mr. Shaw testified, that this removal was on account of the delicate health of his wife, and of Mrs. Sawin who is old and infirm, that they might have the care and advice of Dr. Shurtleff, who then lived near by, but who died soon after their removal thither.

On the 30th day of April, 1875, between ten and eleven o'clock, P. M., Mr. Shaw went again to the house of Atwood in Hayward Place. He registered his name, engaged a room for the night, and paid for one night's lodging, saying to Atwood that he wished to stay there and make it his residence, — to continue his residence there. He was alone, and without luggage. He was assigned a room for the night, retired, and was never seen there afterward.

After that night, the room was let to other transient guests, as usual.

In 1874, Mr. Shaw's son and young Sawin, were assessed as residing at Atwood's house, in Hayward Place. In 1875, they were assessed as residing in Wales Street, Dorchester.

Early in June, 1875, Mr. Shaw went to the house of one Lee, Nos. 142 and 144 Lincoln Street, then in ward 5, but now in the new ward 12, and engaged a room, saying to Lee that he wished to make it his residence. He was given a key, which he has since

retained. He had no luggage or effects with him at that time, and Lee never saw anything there, belonging to Mr. Shaw, "except once in a while a few parcels." Lee saw nothing more of him there until January, 1875. Mrs. Lee testified, however, that she had heard of his being there, occasionally, and Mr. Shaw testified that he had slept there, — how frequently did not appear; that he had occasionally taken meals in the saloon on the first floor, and that he kept some clothing there. The ground floor was occupied by Lee, as a retail liquor saloon and restaurant, and his family lived above. The room engaged by Mr. Shaw was in the half-story next the roof. It was uncarpeted but contained a bedstead, wash-stand, table and two chairs. The other room, on that floor, was occupied by a servant-girl named Doherty. No member of Mr. Shaw's family was ever in the house, so far as appeared. After he had engaged his room, it was occasionally occupied by Lee, and once by one of his guests. No distinct agreement was made, as to what price should be paid for the room, and Mr. Shaw has never paid anything for it, although Lee testified that he was owing Mr. Shaw something when he came there, and the arrangement was that he should pay what was fair. This room is claimed by Mr. Shaw, as his present residence, and he has so declared it since June, 1875.

It appeared by the testimony of numerous witnesses, residing on Wales Street, Dorchester, and in that neighborhood, that since the removal of Mr. Shaw's family and Mrs. Sawin thither in June, 1874, he himself has been continuously a member of the family, and an actual occupant of the house. Several witnesses testified in the most positive manner, that he has lived there for a year and a half or more. In the language of one witness, "He lives on Wales Street with his wife and family, as much as I live on Seaver Street." During the entire period he has been seen, with great frequency and regularity, in the cars of the Highland Street Railway, coming into town from ten minutes before eight to nine o'clock in the morning, and returning in the evening. Wales Street is a short distance beyond the terminus of the Highland line at or near Grove Hall. He has frequently been seen in the station at the terminus, waiting to take a car. So far as it appeared, he always came to the station from the direction of Wales Street, and went toward Wales Street after leaving the cars. Several witnesses have seen him frequently, walking to and from the station through Blue Hill Avenue, from which Wales Street leads. He has been seen, by various witnesses, in and about the house on Wales Street, occupied by his family, and on many occasions, day and evening, sometimes in dressing-gown and slippers,

or other undress, sometimes sitting on the piazza, and sometimes at the table. He has frequently been seen carrying water to the house from a well near by. There was much other evidence of a similar character which it is unnecessary to state.

In the summer of 1875, in conversation with George Z. Adams, Mr. Shaw made an allusion to "the place where he lived, in Wales Street." William F. Merritt, who resides in that neighborhood in a house similar in size and construction to that occupied by Mr. Shaw's family, testified to a conversation, in the house of the witness, late in the summer of 1875, in which Mr. Shaw remarked, "This house is similar to ours." In the fall of 1874, Charles Davenport, meeting him in the horse-cars, inquired where he lived. He replied that he lived "up over the hill, near Dr. Shurtleff's." The house alluded to as Dr. Shurtleff's, is in Wales Street and is the second house from that occupied by Mr. Shaw's family. M. F. Lynch, a vender of newspapers and periodicals, has for a year past delivered the "Globe" newspaper to Mr. Shaw, at the Wales Street house. It did not directly appear, that this was done by Mr. Shaw's direction, but the bills for the newspaper headed "Geo. A. Shaw to M. F. Lynch, Dr.", were uniformly sent to the Wales Street house, and paid by Mr. Shaw's daughter. In one instance the bill was presented at the house to Mr. Shaw in person, who said he would leave the money the next morning, and it was so left, — by whom it did not appear. The same witness had a conversation with Mr. Shaw in the city hall in June or July, 1874. He inquired if Mr. Shaw had moved into Dorchester, to which Mr. Shaw replied that he had, and that he resided there. The witness who lived in Dorchester, then asked him if they might use his name as a delegate to a political convention, to which he replied "Not yet, not yet, not yet awhile," and said that he still claimed his legal residence in ward 5.

George W. Wood, a carpenter, testified that he received an order from Mr. Shaw, May 26, 1875, to do some work upon the Wales Street house, which he did, receiving his instructions from Mr. Shaw. The bill was made out and presented to Mr. Shaw, who said he would pay it. It was afterward paid, partly by Mrs. Shaw, and partly by her daughter.

Lorenzo Abbott, a painter, testified that Mr. Shaw called at his shop in November, 1875, ordered some work upon the Wales Street house, which was done, and subsequently paid for it.

John Galvin testified, that prior to the removal of Mr. Shaw's family to Wales Street in 1874, Mr. Shaw said to him, "You are going to have some new neighbors." Galvin inquired who they were. Mr. Shaw replied that his wife's mother was going to hire

a house in his (Galvin's) neighborhood, and, on account of the delicate state of his wife's health, he was going to take his family out there. Upon being asked whether, in that case, he could come back to the council from ward 5, he replied that he always intended to keep his legal residence where it was then. Galvin lived in ward 17, about ten minutes' walk from Wales Street.

George L. Burt called on Mr. Shaw, at the Wales Street house, during his illness early in 1875. In the course of conversation, he inquired of Mr. Shaw, whether he had taken up his residence out there. Mr. Shaw replied, "No," that his legal residence was still in ward 5, "as usual."

Samuel A. Chittenden, a provision dealer, has furnished the family in the Wales Street house with provisions since their removal thither. The bills are charged to Mrs. Sawin, and paid by Mrs. Shaw. The orders are given, sometimes by Mrs. Shaw, and sometimes by her daughter. The witness never saw Mrs. Sawin.

Jeremiah Harrigan, a member of the common council in 1875, testified that Mr. Shaw's residence was a frequent subject of speculation and jest about the city hall. Meeting Mr. Shaw, in the messenger's room one morning in April, 1875, he said to him, "George, where the —— do you live, anyhow?" Mr. Shaw replied that he boarded with his mother-in-law in Dorchester, but still claimed a residence in ward 5, and that he sometimes said that his home was in the hearts of the people. The witness, being asked by counsel for Mr. Shaw, whether he did not understand the reply to be a joke, said he didn't know about the living in Dorchester, but when Mr. Shaw said his home was "in the hearts of the people," he thought that was a joke.

Thomas R. Cooper and Willard S. Farrington, testified that they have carried letters and papers addressed to George A. Shaw, to the Wales Street house; Cooper, more or less, for a year, and Farrington for five or six months past.

Augustus Parker, a member of the common council, living on Seaver Street, Dorchester, testified that on several occasions during the past year he has been driven in a carriage with Mr. Shaw to Dorchester, late at night, after meetings of the council, or of committees, — once or more to Wales Street; and at other times, he has been left at his own house on Seaver Street, before going to Wales Street, and has heard Mr. Shaw tell the driver to go to Wales Street. He was corroborated to some extent by the testimony of a hack-driver.

Alvah H. Peters, city messenger, testified that a few months ago, some person asked Mr. Shaw, in his presence where he lived.

Mr. Shaw replied that he was "temporarily located" in ward 16. In October, 1875, he directed Peters to send the proceedings of the city government to him at Mrs. Sawin's house on Wales Street. At the commencement of the political year of 1876, he directed Peters to have his address printed on the official envelopes as "142 Lincoln Street." Afterward, he directed it to be changed to "Wales Street, Dorchester, care of Mrs. Sawin," where they have ever since been sent.

Mr. Shaw testified among other things heretofore stated, that he had taken every means known to him to keep his legal domicile in ward 5, and, referring to the hiring of lodgings there, etc., said that he made these arrangements for the purpose of securing his political rights.

Evidence was produced in behalf of Mr. Shaw, tending to show that Jenkins, the petitioner, for two years or more, has been an inhabitant of ward 8, and that he had no home, or dwelling-place, in ward 5, during the year preceding the election. The petitioner offered no evidence in rebuttal.

The foregoing statement comprises the substance of all the evidence in the case. Upon this evidence there was, and could be, substantially no dispute, that, on the one hand, Mr. Shaw has always declared his legal residence, or legal domicile, to be in ward 5, and taken such steps as he deemed sufficient, to make his declared intent effectual; and, on the other, that his place of actual residence to all intents and purposes has been in ward 16, since June, 1874, and that he has had no actual residence in ward 5 for several years. The facts are clear and indisputable, the evidence being substantially conclusive on both points. Indeed, it was admitted by counsel, that the only question in the case, was of the legal effect of the evidence, the facts as to actual habitancy being substantially conceded. All the outward *indicia* of habitancy surround the Wales Street house, and point to it as Mr. Shaw's home. He constantly resorts there, and there he spends the greater part of his time when not engaged in his daily avocations; he orders and pays for repairs upon the house; he assists in the household duties; he receives his letters, papers and bills there, and there reside his wife and children, with whom his relations of affection and duty continue undisturbed. The "temporary" absence of his family from ward 5 has uninterruptedly continued for ten years. The object with which, as he says, he removed his family to Dorchester, namely, to secure the benefit of Dr. Shurtleff's care, was defeated by the death of that gentleman within a few months after the removal. There was no evidence before the committee that he has ever intended to return with his family to ward 5 as a place of actual residence.

He did not so testify, nor, so far as the evidence shows, has ever so declared, though his declarations that he intended to ret it as his legal or political domicile have been constant. Nor there any evidence tending to show that he ever had any intent to terminate his residence, or the residence of his family, in L chester at any definite time. The fact that he has been asses and registered in ward 5, taken in connection with the testim of the assessors and registrars, as to their mode of procedure, no effect, except as evidence of his intent (*Fisk* v. *Chester*, 8 Gr 506), for the testimony of the officers shows, that a person is asses in the ward which he claims as his residence, without regard to fact, and that he is registered where he is assessed; the result this system being, that the mere declaration of the person fi the place of assessment and registration, in the absence of evide to the contrary. The acts of Mr. Shaw, in hiring lodgings, etc. ward 5, in 1874 and 1875, when set against the circumstan surrounding his occupancy of the Wales Street house, are of li weight. It is impossible to allow them any effect, as acts of act habitancy, done *bona fide*, and without any ulterior purpose. deed, Mr. Shaw explicitly says, that they were done "for the p pose of securing his political rights." Apparently, he believed th effectual for his purpose, but he mistook the law. They are without significance, however, for they are in the nature of admissi against himself.

Upon the evidence, the committee found the following facts:

1. That in 1867, or prior thereto, Mr. Shaw removed from w 5, having no definite intention ever to return to that ward a place of actual residence.

2. That he has had no place of actual residence, there, since 18

3. That his acts, in hiring lodgings there, etc., in 1874 and 18 were done solely with a view to retain a domicile there for politi purposes, and not as acts of actual habitancy, or with any view future actual habitancy.

4. That his home, dwelling-place, or place of actual residen from June, 1874, to the time of the election, was in ward 16.

5. That, at the time of his removal thither, in 1874, he had intention to abandon it, as a place of actual residence, at a definite time, nor has he since had such intention.

Under the Constitution of this Commonwealth (Amendmer Art. XXI.), "every representative, for one year at least, n preceding his election, shall have been an inhabitant of the d trict for which he is chosen."

In the Constitution, also (part second, chap. 1, sect. 2, sec clause), the following rule of interpretation is prescribed: "A

to remove all doubts concerning the meaning of the word 'inhabitant,' in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing, and being elected, into any office or place within this state, in that town, district or plantation, where he dwelleth or hath his home."

Applying the constitutional test to the case of Mr. Shaw, there seems to be no doubt as to the result. The requirement being, that he shall have been an "inhabitant" of his district during the entire year preceding his election, and an inhabitant of the district being one who "dwelleth or hath his home" there, he was certainly ineligible, unless the words of the Constitution are to be construed in some technical sense, differing from the ordinary and popular acceptation, and unless it is possible for a person to "dwell or have his home" in a certain place, in some legal sense, without in fact dwelling or having his home there.

The law of domicile is apparently involved in some uncertainty and confusion, arising less, however, from any difficulty in the subject, than from the careless manner in which questions arising under it have frequently been treated from an inaccurate use of terms, and from failure to observe well-grounded distinctions. These causes have operated to produce many erroneous impressions in the popular mind. Many of the cases before election committees are entirely worthless as precedents, and the decisions of the courts, though of superior authority, are not entirely in harmony with each other. In the opinion of the committee, however, the controlling principles are sufficiently plain, and the difficulties which are supposed to surround a question of this character, arise more from misunderstanding and misconstruction, than from any inherent obscurity or defect in the law.

In prescribing the rule of interpretation, found in the Constitution, and above referred to, the framers of that instrument declared their purpose, — which was, "to remove all doubts concerning the meaning of the word 'inhabitant,' in this Constitution." Apparently, they considered that no person could misunderstand the meaning of the terms in which they define an inhabitant; namely, one who "dwelleth or hath his home," in a certain place. The words would still seem too plain for doubt, but for the erroneous and unfounded, though somewhat general impression, that a person may have a "domicile" in one place for some political purpose, while actually and permanently residing elsewhere; an idea which has probably arisen, in part, from the long-continued toleration of the pernicious practices of designing persons, who, to obtain office, to avoid taxation, or for other purposes, claim and are allowed to retain domiciles to which they are not legally en-

titled. The purpose of the framers of the Constitution evidentl was, to require the representative to dwell in the midst of his cor stituency, to whom he might thus be easily accessible, and t require constituencies to be represented by one of themselve through whom they might easily secure their rights, and mak known their grievances. There are obvious reasons for this require ment. The same provisions were extended by the Constitutio to councillors, senators and representatives; and, while othe restrictive qualifications have, from time to time, been remove (Const. Amend., Arts. VI., VII., XI.), this has continued th settled policy of the Commonwealth, since the adoption of th Constitution.

There is another consideration of some significance. The cor stitutional definition of "inhabitant" applied alike to voters an persons voted for. The rule was prescribed for the benefit o the former as much as of the latter. It is reasonable to suppos therefore, that the purpose was to define the word, in terms whic no citizen, however unskilled or unlearned in the technical use o signification of words, could mistake; and, having this in view, was declared that a person shall be deemed an inhabitant of th place wherein he dwells or has his home, the meaning of thes terms being plain to the commonest understanding.

To "dwell," according to Webster, is to stay, to abide as permanent residence, to have a habitation for some time, or pe manence; according to Worcester, to abide for some length o time, to continue, to have a fixed place of residence. "Home. in Webster, is the house in which one resides; residence, the plac in which one dwells, — all that pertains to a dwelling-place; i Worcester, one's own house, dwelling, or place of abode, residenc

As there can be no doubt, that Mr. Shaw did not actually dwel or have his home, in ward 5, during the year preceding the elec tion, the above considerations seem to be decisive. It was urge in his behalf, however, that the constitutional provisions are not t be construed, according to the natural and ordinary sense of th words used, but that "inhabitancy," "dwelling-place," "home, "residence," and "domicile," as used in our Constitution an statutes, are interconvertible and synonymous terms; that purely legal residence or domicile is equivalent to actual inhab tancy, a dwelling-place or home, and that Mr. Shaw, having had legal domicile in ward 5, in 1866, or previously, cannot b deprived of it, except by abandonment of it with no intent t return and the acquisition of a domicile elsewhere.

The difficulty with this proposition is, that it involves the fals assumption that a person may have a "legal residence," "leg

domicile," or domicile for political purposes in one place, while actually and permanently residing elsewhere; and that mere intent to have a political domicile in a particular place is sufficient, without the concurrent fact of actual habitancy.

In support of his position, counsel for Mr. Shaw cited *Opinion of the Justices*, 5 Met. 587. The question there, was of the qualification of a voter, under Constitutional Amendments, Art. III., whereby the right was conferred upon a citizen, "who shall have resided" in the Commonwealth and district, etc. The justices consider the word "inhabitant," in the Constitution, and "one who has resided," in the amendment, as substantialy identical in meaning, and that both expressions are equivalent to "domicile." But it is plainly evident from the whole opinion, that they attach no meaning to the word "domicile," save its popular one, as the principal place of abode, or actual residence, and that is the only correct interpretation of the term. There is nothing in the opinion to imply that a person may have a domicile in one place, for political puposes, while actually residing elsewhere. On the contrary, the justices cite *Abington* v. *North Bridgewater*, 23 Pick. 170, in which case the court say that "domicile" and "place of inhabitancy" are substantially identical in meaning, but that both, under the Constitution, signify the place where one "dwelleth or hath his home." Bouvier defines domicile as "the place where a person fixes his ordinary dwelling, without a present intention of removal;" and Burrill, as "a residence at a particular place, accompanied by positive or presumptive proof of an intention to remain there for an unlimited time." There can be no domicile in any sense, or for any purpose, by force of mere intent, without residence. The rule that the fact and intent must concur, is laid down in *Opinion of the Justices*, *supra*, and is so well established, that other authority need not be cited in support of it. It does not follow, from this, that the actual residence in the place of domicile must be constant and unbroken. A person absent from his domicile for a temporary purpose will not lose it thereby. But the committee are unable to say that Mr. Shaw's absence from ward 5, as a place of actual residence for ten years past, is merely temporary. The fact appears to be the other way, and so the committee are obliged to find.

In *Harvard College* v. *Gore*, 5 Pick. 377, the court say that the doctrine that there may be at the same time a domicile of right and a domicile of fact is not supported by the authorities. The following language from the opinion in that case was much relied on by counsel for Mr. Shaw: "The term inhabitant, as used in our laws, etc., means something more than a person having a

domicile. It imports citizenship and municipal relations. . . . An inhabitant, by our Constitution and laws, is one who, being a citizen, dwells or has his home in some particular town, where he has municipal rights and duties, and is subject to particular burdens; and this habitancy may exist or continue, notwithstanding an actual residence in another town or county, provided the absence is not so long, or of such a nature, as to interrupt or destroy the municipal relation previously formed." This is undoubtedly correct, but, in its application to the present case, it must be remembered, first, that the evidence shows, and the committee are obliged to find, that Mr. Shaw does not dwell, or have his home in ward 5; and second, that his habitancy in ward 16 cannot be considered merely temporary. Further, if he actually dwells in ward 16, he has municipal rights and duties there, and nowhere else. He may decline to exercise the rights, and he may evade the duties, but they are his nevertheless if he actually resides there and his residence is not for a temporary purpose. In the same case, the court say that "the right to vote, eligibility to office, and the liability to taxes, in one town, are necessarily exclusive of the same rights and liabilities in all other towns." There can be no doubt, upon the facts of Mr. Shaw's case, that he could have voted, and become a candidate for office, in ward 16, in 1875, had he seen fit to claim the right.

Change of domicile does not depend so much upon the intention to remain in the new place, for a definite or indefinite period, as upon its being without a definite intention to return. An intention to return, however, at a remote or indefinite period, to the former place of actual residence will not control, if the other facts which constitute domicile, give the new residence the character of a permanent home, or place of abode. The right of election exists only where the facts of residence are ambiguous. *Hallett* v. *Bassett*, 100 Mass. 167, and cases cited.

Great confusion has sometimes arisen from misuse of the word and misunderstanding of the doctrine of *intent*. In the outset it may be observed that there is a clear distinction between intent and declaration of intent. Intent is a fact, to be proved like other facts, by evidence. The declaration is merely evidence of the intent, and is conclusive or not, according to circumstances. It is always liable to be controlled by other evidence, the declaration or election being but one element in determining the fact. And where the acts of a person are inconsistent with his declarations, the actual intent must be found, as a fact, upon the whole evidence. A declaration of an intent, which does not in reality exist, is ineffectual for any purpose. And an actual intent, unaccompa-

nied by any concurrent act is equally ineffectual. In any case wherein the intent is material, it is important to ascertain what the intent actually is, and whether it is as declared, or not. In the present case, admitting that Mr. Shaw's intent was as he declared it, yet it is wholly nugatory; for his declarations have been, not of an intent to abandon ward 16, as a place of actual residence at any particular time, or ever to return to ward 5 as a place of actual residence, but merely to retain it as his legal or political domicile. There is no such thing as a "legal" or "political" domicile, in one place, if the actual and permanent residence is elsewhere, and an intent to have it so cannot make it so. If a person leaves one place of residence, and becomes an actual resident elsewhere, and such latter residence is not, in fact, temporary, the latter place becomes his domicile, and municipal rights and duties attach to him there, whether he would have it so or not. If it be suggested, that Mr. Shaw cannot have acquired a domicile in ward 16, without an intent accompanying his actual residence there, the suggestion is easily met. The intent which the law regards, is not an intent that the facts shall have a particular legal effect, but an intent as to the facts themselves. The question is not, whether Mr. Shaw, in removing to Dorchester, intended to vote, pay taxes, and run for office there, but whether he intended to *live* there.

In the present case, although the committee were obliged to find that Mr. Shaw had no intent to actually dwell in ward 5, or return to it as a place of actual residence, yet, if the fact was otherwise, it could not change the result. The intent is important, only when the person, actually and *bona fide*, has two or more real places of abode, and the circumstances attending his occupancy of each are such as to leave it doubtful which is, in fact, his principal residence. *Hallett* v. *Bassett*, *supra*, and cases cited. The facts here do not present such a case.

In *Wait* v. *Ingalls*, *ante*, p. 133, the committee found that Ingalls' absence in Maine was intended to be, and was, merely temporary, and that his actual intent throughout was to remain an inhabitant of Massachusetts. It is difficult to see how that conclusion was reached upon the facts but that finding determined the case and distinguishes it from the present.

Holman's case, Mass. Election Cases, Cushing, S. & J., 647, differs essentially from this in its facts. Mr. Holman retained an actual place of abode for his family in Boston, which they occupied during a portion of the time, and the committee found that his residence in Newton for a few months was merely temporary.

Lyman v. *Fisk*, 17 Pick. 234; *West Boylston* v. *Sterling*, *Id.* 128; *Sears* v. *Boston*, 1 Met. 250; *Jennison* v. *Hapgood*, 10 Pick.

77; *Cochran* v. *Boston*, 4 All. 177; and *Com.* v. *Kelleher*, 115 Mass. 103, were also cited for Mr. Shaw, and have been carefully examined. They require no special notice here. In several of them, the question was only, whether certain evidence was sufficient to warrant the jury in finding the fact of domicile. They are all distinguishable from the present case, in their facts, and contain nothing in conflict with the views presented here.

The case most directly in point is *Holmes* v. *Greene*, 7 Gray, 299. This case will be found fully to support the position of the committee; and indeed it goes further than the present case requires. It was held that a citizen of Massachusetts, removing with his family from Fall River into the adjoining town of Tiverton, in Rhode Island, a short distance from his former residence, retaining his place of business in Fall River, and actually intending to retain his domicile there, and to return there at a future period, after such absence for a year, had lost his domicile in Massachusetts. See, also, *Whitney* v. *Sherburne*, 12 All. 111.

Upon the law and evidence, the case seems to resolve itself into this: —

Mr. Shaw, having once had a legal domicile in ward 5, has lost it by actual and continued residence elsewhere, unless he has been able to take, and has taken, the necessary steps to retain it.

To do this, he has uniformly declared an intent to retain it.

He has accompanied his declaration with certain acts, which, on the whole evidence, are without effect in his favor and in some respects are significant against him.

The declared intent, alone, is clearly insufficient. If he has ever declared an intent to return to ward 5, as a place of actual residence, his declaration is controlled by the other evidence, and the committee are obliged to find that in fact he had not such intent.

The acts are insufficient, certainly, unless done *bona fide*, as they were not, and accompanied by an actual intent to return to ward 5, as a place of residence which did not exist.

Whether, therefore, the view of the law, originally taken by the committee, or that contended for by counsel, be correct, the result is the same. The committee find, and report, that Mr. Shaw was not, for one year next preceding his election, an inhabitant of the district for which he was chosen, and that he was ineligible to election therein.

Near the close of the hearing, evidence was produced, tending to show that, for more than two years preceding the election, Jenkins, the petitioner, was an inhabitant of ward 8, living with his mother in Hudson Street, and during that time he had no home,

dwelling-place or domicile, in ward 5. The petitioner had ample opportunity to rebut this evidence, if it was untrue, but made no attempt to do so. The evidence raised great doubt in the minds of the committee, whether Jenkins was eligible as a candidate, and the burden of proof being upon him, they cannot find that he has sustained it. Although it was shown, that he received at the election the highest number of votes next to Mr. Shaw, they do not consider themselves justified in reporting that the petitioner is entitled to the seat.

There is a consideration of grave importance, which the committee feel bound to bring to the attention of the house, although it has in no degree influenced their decision. Unless the parties misunderstood the requirements of the law, the case apparently presents a gross example of political chicanery. Mr. Jenkins, an inhabitant of the eighth Suffolk district, contests the claim of Mr. Shaw, an inhabitant of the fifth Norfolk district, to the seat as representative from the fifth Suffolk district. The committee are unable to say, whether similar practices are generally prevalent in the Commonwealth, but, in their opinion, a single instance should not be allowed to pass unnoticed. The influence of every such example is corrupting, and tends to the demoralization and debauchery of politics, and the total subversion of the principles on which, alone, a popular government can rest. Admitting that the parties to the present case acted innocently, and are deserving of no rebuke, it is still within the power of the house, in the interest of public policy and political morality, to establish a precedent, which shall put a salutary check upon the designs of persons who may hereafter attempt to trifle with the law. The committee are unanimous in offering these suggestions.

The committee recommend that the petitioner have leave to withdraw, and they submit the accompanying resolution.

Mr. Ward, of the committee, while substantially agreeing with the majority, as to the facts, is unable to concur in the conclusion.

[The resolution declared the seat of the sitting member vacant. The report that petitioner have leave to withdraw was accepted. H. J., 1876, p. 172. After postponement, and extended debate, the resolution declaring the seat vacant was adopted, by a vote of 126 yeas to 67 nays. H. J., 1876, p. 179.]

Horace L. Bowker et al., Petitioners.

House Document, No. 144. March 7, 1876. Report by A. E. Pillsbury, *Chairman;* Mr. Dean dissenting.

Votes for ineligible Candidate. Where the seat of a representative has been declared vacant, on account of the ineligibility of the member returned, it cannot be filled by the person having the next highest number of votes, being less than a plurality.

New Election. When refused. Where the seat of a member has been declared vacant, and since the election a new division of wards has been made, and the authority of the ward officers to conduct and make return of the election of representatives has expired, so that an act of the legislature is necessary to provide a new registration of voters, a polling place, and election officers, which must postpone such election until near the end of the session, a new election will not be ordered, especially where the district continues to be represented by two of the three representatives to which it was entitled.

Alphonso J. Robinson *for petitioners.*

The Committee on Elections, to whom were referred the petitions of Horace L. Bowker, Francis M. Hughes, Richard J. Fife and Robert McCue, respectively, claiming the seat as representative from the fifth Suffolk district, recently vacated; the petitions of John Davis and others, and Edward B. Rankin and others, that a new election be ordered, in said district; and the remonstrance of George F. Gay and others against the same; having met the parties, and heard the arguments of counsel, submit the following report: —

The petitions of Bowker, Hughes and Fife, were in substance the same; each petitioner claiming the seat, on the ground that he received the highest number of votes cast, for any eligible person, next to the present sitting members. McCue alleged, only, that he was a candidate, and received a large number of votes.

It being doubtful whether, upon the occurrence of a vacancy, by reason of ineligibility, the person receiving the next highest number of votes, being less than a plurality, is thereby entitled to the seat, it was thought proper to have this question first considered, as the determination of it might dispose of all the petitions, and obviate the necessity of a hearing upon the facts, to ascertain which of the petitioners had the better right. No objection being made to this order of proceeding, the petitioners and their counsel were heard upon this question.

The Constitution declares that, "in all elections of civil officers, by the people of this Commonwealth, whose election is provided for by the Constitution, the person having the highest number of votes shall be deemed and declared to be elected." Amend. Art. 14. There is no constitutional or statutory provision, for the filling of vacancies in the house of representatives, except the declaration of the Constitution, chap. 1, art. 10, that the house "shall be the judge of the returns, elections and qualifications of its own members," and the statutory provision that, "when a vacancy occurs in a representative district, the speaker of the house of representatives shall, in the precept which he may issue, by order of the house, giving notice of such vacancy, appoint a time for an election to fill the same." Acts of 1874, chap. 376, sect. 33. It is, therefore, entirely within the power of the house, to cause a vacancy to be filled, or omit so to do, at their pleasure, and to award the seat to any person possessing the constitutional qualifications. The powers of most legislative bodies are of similar extent, and the rule of procedure, in cases of this character, is therefore to be drawn almost wholly from precedent.

The English rule is, undoubtedly, that if the majority candidate is ineligible, and the voters have notice of the fact at the time of the election, the person receiving the next highest number of votes, if eligible, is elected. *Male on Elections*, 336; *Clarke on Election Committees*, 156; *Second Southwark case*, *Clifford on Elections*, 259. But the committee are unable to learn that this rule has ever been adopted in this country, save in the state of Indiana (*Carson* v. *McPhetridge*, 15 Ind. 327), while the decided weight of authority is against it.

The American doctrine appears to be, that a majority, or at least a plurality, shall in every case be required, to elect a person to office by popular vote, and that no rule or practice should be adopted, or sanctioned, whereby a person may be admitted to office by virtue of a less number of votes. The English rule would, in many cases, result in compelling a large majority to submit to the will of a small minority, and, if carried out to its legitimate results, might enable a person to reach an important office by a single vote, cast perhaps by himself. Sound policy, as well as reason and authority, seem to forbid the adoption of such a doctrine in this country, it being a fundamental principle of our system of government, that only the will of a majority, or at least of a plurality, shall control. To this effect, see *Com.* v. *Cluley*, 56 Pa. St. 270; *Saunders* v. *Haynes*, 13 Cal. 145; *State* v. *Giles*, 1 Chand. Wis. 112; *State* v. *Smith*, 14 Wis. 497; *Opin-*

ion of Justices, 38 Me. 597; *State* v. *Anderson*, 1 Coxe, N. J., 318; *People* v. *Clute*, 50 N. Y. 451; *Dillon Mun. Corp.*, § 135, and cases cited.

This doctrine has been adopted in both houses of Congress. In *Smith* v. *Brown*, 2 Bartlett, 395, in the house of representatives the authorities are reviewed, in an able report by Mr. Dawes, chairman of the committee on elections, and the conclusion reached that the English rule "has never been adopted in this country, and is wholly inapplicable to the system of government under which we live." In the senate the question was elaborately discussed, in *Abbott's case*, Senate Rep. 58, 42d Cong., 2d sess., in which it is asserted that in this country an election by a minority of the persons voting is not to be tolerated under any circumstances, and that whether the voters have notice of the ineligibility of a candidate or not, is of no consequence. The report was adopted by the senate, after an exhaustive debate.

The same rule was followed by this house, in *Pease* v. *Rowell*, *ante*, p. 108. The seat of Rowell was contested by Wesley A. Gove, who received the next highest vote, on the ground that Rowell had not been an inhabitant of the district for one year next preceding the election. The committee found that Rowell was ineligible by reason of non-residence, and reported a resolution unseating him, and awarding the seat to Gove. From the journal of the house it appears that, after debate, the latter part of the resolution, declaring Gove entitled to the seat, was stricken out, and the former part, unseating Rowell, adopted.

The case of *Somerset*, Cushing, S. & J., 576, has sometimes been cited, as authority for the proposition that votes cast for an ineligible candidate are to be treated as blanks, leaving the election to the person having the next highest vote; but an examination of that case will show that it does not support this position. The case arose in 1849, before the adoption of the 14th constitutional amendment, and while the majority rule was in force. The point decided was only that a vote cast for an ineligible candidate should be rejected, in determining what number constituted a majority of all the votes cast. No question arose as to the right of a person having the highest vote next to an ineligible candidate.

The claim of the petitioners appears to be unsupported, either by principle or authority. Under these circumstances, the committee would not be justified in reporting in favor of either, even if it were ascertained which has the better right. Considering the case of each petitioner by itself, and admitting all his allegations of fact to be true, he does not establish his right to the seat.

The committee, therefore, recommend that the petitioners, Bowker, Hughes, Fife and McCue, severally have leave to withdraw.*

* [NOTE BY THE EDITORS. *Votes for Ineligible Candidates.* The early opinion in Massachusetts, although never affirmed by its courts, was that votes cast for ineligible candidates must be regarded as blanks and void, thereby giving the election to the person receiving the next highest number of votes. Mr. *Cushing*, in his Law and Practice of Leg. Assemblies, § 175, stated the principle: — "If an election is made, of a person who is ineligible, that is, incapable of being elected, the election of such person is absolutely void, even though he is voted for at the same time with others who are eligible, and who are accordingly elected; and this is equally true, whether the disability is known to the electors or not, whether a majority of all the votes, or a plurality only, is necessary to the election, and whether the votes are given orally or by ballot." Mr. Cushing relies, for his authority, upon English cases; and the house of representatives, in the earlier election controversies, was inclined to follow the rule, which he sought to ingraft from the English authorities. This was done, presumably, partly on account of those authorities, and partly because, under the system then in force, of requiring a *majority* vote to elect, it was more convenient to reject entirely, votes for ineligible candidates. Case of *Somerset*, Cushing, S, & J., 576; *Report on Votes for Ineligible Candidates*, *Ib.* 496. It should be observed, however, that the English rule, originating in the famous Parliamentary Contest of Wilkes and Luttrell, in 1769, has been materially modified, and much of its injustice removed, by the later English cases. The present rule in England is formulated by *Leigh & LeMarchant*, in their Law of Elections, p. 187, as follows: — "Whenever, at the time of election, a candidate is incapacitated from sitting in Parliament, and due notice is given to the electors, all votes given *subsequent* to the publication of that notice for that candidate, will be thrown away and void. . . . . Express notice of a disqualification must in all cases be given, and all votes recorded before such notice, are good. When, therefore, the notice has not been given, until after the election has begun, the question arises, whether it was given to a sufficient number of electors, so that by striking off certain votes from the sitting member's poll, the petitioner would be placed in a majority. If possible, the notice should be personally served on every voter, and advertised in the newspapers; if that be impossible, the notice should be affixed to some conspicuous place, near the polling-place, and should be widely placarded, if the disqualification is discovered on the nomination day. . . . . Knowledge, on the part of voters, of a fact, which, if they knew the law, they would know constituted a disqualification, will not amount to a sufficient notice of disqualification, for the purpose of seating the next unsuccessful candidate." And see, *Regina* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. 629; *Drinkwater* v. *Deakin*, L. R. 9 C. P. 626; *Galway*, 2 O'Malley & Hardcastle, 46; *Tipperary*, 3 *Ib.* 41; *French* v. *Nolan*, Irish Rep. 6 Com. Law, 464.

The American Rule does not regard Votes for Ineligible Persons as Blanks. The committee, in the above case, in refusing to follow the English rule, established the practice in the house of representatives, in full accord with the great weight of American authority. As stated in the report, Indiana is the only state which adopted, and apparently adheres to, the former rule and practice in England, holding that where, by statute, a person occupying a judicial position is declared ineligible to any other office, votes for such a person, for such other office, must be presumed to have been cast with at least constructive notice of the statute ineligibility, and are void, so that the next highest candidate is elected. *Gulick* v. *New*, 14 Ind. 93. This case is not law to-day, either in England or this country, although the Indiana court affirmed it in *Price* v. *Baker*, 41 Ind. 572.

In New York, the rule is stated by Judge Folger, in *People* v. *Clute*, 50 N. Y. 451, 466: — "We think that the rule is this: the existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that, to give his

The principal argument presented by the petitioners, Davis and others, and Rankin and others, for a new election, was that the

vote therewith, indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a wilfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied. . . . . It is much to presume . . . . that any considerable body of electors will purposely so exercise their right of electing to office, as that it shall be but an empty form; and that, going through with outward signs of an election, they will, of intent, so cast their ballots as that they will be votes wasted." The other American authorities go even farther, in recognizing the common-sense presumption, that, when a voter goes to the polls, and votes for actual persons, although such persons may be ineligible, he does not intend to cast a blank vote, but does intend, at least, that the vote shall count against the opposing candidates. In California, the court say: — "An election is the deliberate choice of a majority, or plurality, of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows, that the next to him on the poll should receive the office. If this be so, a candidate might be elected, who received only a small portion of the votes, and who never could have been elected at all, but for this mistake. The votes are not less legal votes, because given to a person in whose behalf they cannot be counted, and the person who is the next to him, on the list of candidates, does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast, as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretentions the people had designed to reject." *Saunders* v. *Haynes*, 13 Cal. 145, 153. Affirmed in *Satterlee* v. *San Francisco*, 23 *Ib.* 314; *Crawford* v. *Dunbar*, 52 *Ib.* 36.

The other states, in which the question has been raised in court, affirm the rule: — For Maine, see *Opinion of Justices*, 38 Me. 597; — Pennsylvania, *People* v. *Cluley*, 56 Penn. 270; where Mr. Justice *Strong* said: "The votes cast at an election, for a person who is disqualified from holding an office, are not nullities; they cannot be rejected by the inspectors, or thrown out of the count by the return judges; the disqualified person is a person still, and every vote thrown for him is formal"; — New Jersey, *State* v. *Anderson*, 1 Coxe, N. J. 318; — Wisconsin, *State* v. *Giles*, 1 Chand. (Wis.) 112; *State* v. *Smith*, 14 Wis. 497; *State* v. *Tierney*, 23 *Ib.* 430; — Michigan, *People* v. *Molitor*, 23 Mich. 341; — Minnesota, *Barnum* v. *Gilman*, 27 Minn. 466; — Missouri, *State* v. *Vail*, 53 Mo. 97; *State* v. *Walsh*, 7 Mo. App. Cases, 142; where the candidate elected had died on the morning of the day of election, and the court held, notwithstanding, that the opposing candidate was not entitled to the office; — West Virginia, *Dryden* v. *Swinburne*, 20 W. Virg. 89; — Kentucky, *Stephens* v. *Wyatt*, 16 B. Mon. 542; — Mississippi, *Sublett* v. *Bedwell*, 47 Miss. 266; — Louisiana, *Fish* v. *Collins*, 21 La. An. 289; — Arkansas, *Sweepston* v. *Barton*, 39 Ark. 549. In Congress, the same rule, recognized in *Smith* v. *Brown*, 2 Bartlett Cong. Election Cases, 395, referred to in the above report of the committee, has been followed and reaffirmed in *Maxwell* v. *Cannon*, Smith Cong. Election Cases, 182, and in the recent case (1882) of *Cannon* v. *Campbell*, 2 Ellsworth Cong. Election Cases, 604; where the house found that Cannon, who received a large majority of the votes (over 17,000 majority) for delegate to Congress from Utah, should be excluded, because he had plural wives, but that the opposing candidate, to whom the certificate of election had been given, was not entitled to the seat, as he had received only a minority of the votes cast at the election.]

people of the district are entitled to their full representation, and cannot justly be deprived of it; that, in view of the authorities, the vacant seat cannot be given to either of the claimants, and that it can be properly filled only by an election. This argument is undoubtedly of some force. On the other hand, it may be said, that the district has now in the house two of the three representatives to which it is entitled; and that, under the peculiar circumstances of this case, some difficulties lie in the way of a new election. At the time of the election, in November, 1875, ward 5, in the city of Boston, constituted the fifth Suffolk representative district. The authority of the officers of that ward, whose duty it was by law, to conduct and make return of the election of representatives, as of other officers, expired Dec. 13, 1875, under chap. 243, sect. 3, of the Acts of 1875. By an ordinance of the city of Boston, approved Nov. 16, 1875, a new division of wards was made, throughout the city. The territory of the old ward 5 was divided among four different wards of the new establishment. The ordinance contained no saving clause, for any purpose. The combined effect of the statute and ordinance was to abolish the old ward 5, with all its political incidence. It is manifest, therefore, that a new election of representative in the fifth Suffolk district cannot be had, except by virtue of an act of the legislature, providing for the registration of voters, the establishment of a polling-place, the appointment of officers to conduct and make return of the election, etc. To pass such an act and carry it into effect, would be a work of some time, and it is hardly probable that the person returned could take his seat until near the end of the present session.

No particular rule seems ever to have been adopted or settled upon by the house, in relation to ordering a new election in case of a vacancy. It has frequently been done, and perhaps as frequently left undone. The cases in which the house has omitted to proceed for a new election appear to rest upon a great variety of reasons, and are too numerous to be cited here.

It was stated at the hearing, by counsel for the petitioners, Davis and others, and Rankin and others, that they would be content to abandon their petitions, in case the committee came to the conclusion that the seat could not be given to either of the claimants.

Having suggested the arguments for and against a new election, so far as they apprehend them, the committee prefer to leave the determination of the matter entirely to the judgment of the house; and for the purpose of presenting the question, they report that the petitioners, Davis and others, and Rankin and others, and the

remonstrants, Gay and others, severally have leave to withdraw.

Mr. Dean, of the committee, does not concur in the report.

[A minority report was made by Mr. Dean. The report of the majority of the committee was accepted. H. J., 1876, p. 284.]

HOUSE—COMMITTEE ON ELECTIONS, 1877.

Messrs. HOSEA M. KNOWLTON of New Bedford, *Chairman;* ISAAC WINSLOW of Middleborough, WILLIAM W. WILDE of Concord, THOMAS M. BABSON of Boston, CHARLES H. INGALLS of No. Adams, JOHN C. PERRY of Springfield and DARIUS PIERCE of Methuen.

ELIJAH A. MORSE *v.* THOMAS LONERGAN.

House Document, No. 9. January 19, 1877. Report by T. M. BABSON.

Recount of Votes refused. The facts, that the sitting member was returned as elected by only eleven plurality; that as the votes were first announced, in one of the towns in the district, he had but seven plurality, and that, owing to a scarcity of printed ballots in that town, many of the votes for the petitioner were written in lead pencil; — are not sufficient grounds for a recount of the votes by the house of representatives.

Rule in *Burt* v. *Babbitt, ante*, p. 174, affirmed.

The Committee on Elections, to whom was referred the petition of Elijah A. Morse, contestant for the seat now occupied by Thomas Lonergan, from the fourth Norfolk district, asking that the votes of said district be recounted, have duly considered the same, and report as follows: —

The committee have been governed in their decision in this case by the rule adopted by former committees on elections, and which rule has been endorsed by different houses of representatives. The rule referred to is this: that in the absence of any evidence of fraud in the manner of calling, holding or conducting the meeting, at which the election is held, or in the manner of ascertaining the result of the election, or unless the petitioner shows a reasonable ground for supposing an error in the count, other than the mere closeness of the vote, the committee will not recount the bal-

lots. The only evidence offered before your committee, in support of the contestant's claim, other than the fact that there is a difference of but eleven votes, between the number of ballots cast for the sitting member and those cast for the petitioner, consisted in the statement of the petitioner, that, as the vote was first announced in Milton (one of the towns in the fourth Norfolk district), the sitting member had only seven plurality, and that, owing to a scarcity of printed ballots in Milton, many of the votes for the petitioner had his name written in lead-pencil. As the committee did not see any reason why written ballots could not be counted as correctly as printed ones, and as a plurality of seven would have been as effectual for the sitting member as a plurality of eleven, they are of opinion that these facts, if true, did not take the case out of the operation of the above stated rule. The committee, therefore, are of opinion that the sitting member is entitled to his seat, and recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1877, p. 71. A motion to reconsider the acceptance of the report was laid on the table, and afterwards taken up, and rejected. *Ib.*, p. 79.]

S. S. McGIBBONS *v.* EDWIN WALDEN.

House Document, No. 27. January 24, 1877. Report by Messrs. KNOWLTON, WINSLOW, PIERCE and PERRY, — Messrs. BABSON, WILDE and INGALLS dissenting

Recount of Votes refused. The fact that the sitting member was returned in a district, composed of a ward in a city, as elected by a plurality of one or two votes; that, within the proper time, ten citizens petitioned the aldermen for a recount, which was refused upon very technical, if not insufficient, grounds; and that the final return of the vote, by the ward officers, differed from the first declaration of the vote, was *held*, by a majority of the committee, as insufficient to justify a recount of the votes by the house of representatives, in view of the fact that, after the first count, and declaration of the vote, upon a doubt as to its accuracy, all the votes for representative were carefully recounted, by all the ward officers, and the result found as finally returned.

Mistake in Name of Candidate. It was decided, upon the evidence, that a vote for "Edwin *Waldron*" should be counted for Edwin Walden.

The Committee on Elections, to whom was referred the petition of S. S. McGibbons and others, asking for a recount of the votes

for representative in the eleventh Essex district, being the district now represented by Edwin Walden of Lynn, having considered the same, submit the following report: The grounds upon which the petitioners asked for a recount were, that the petitioners had "reason to believe that, through mistake in counting the votes for representative, in said district, on the 7th day of November last Edwin Walden was erroneously declared elected, in place of Harris O. Chadwell, whom they believe to have been legally elected." The question thus presented to the committee was, simply, whether there was a "mistake in counting the votes for representative"; and upon this question the parties and their evidence were fully heard.

The eleventh district consists of ward 6, in Lynn, and elects one representative. The official return of the votes for representative was admitted to be as follows: —

Edwin Walden, ...	547
Harris O. Chadwell, ...	546
Scattering, ...	18

One of the scattering votes was for *Edwin Waldron*, and, upon the evidence before them, the committee do not doubt that that vote should be counted for the sitting member, this giving him, upon the returns, a plurality of two votes over the contestant.

The petitioners, to establish their case, relied upon the following facts, which were not disputed: —

1. That the vote was very close.

2 That the announcement made by the warden, at the close of the balloting, was as follows: —

Walden, ...	552
Chadwell, ...	541

with scattering votes; while the figures as finally arrived at as the official return, were the result of a recount; thus showing a wide discrepancy in the result of the two counts, leading, apparently, to the conclusion that the count of the ward officers was unreliable.

3. That within three days after the day of election, more than ten citizens of the ward petitioned for a recount of the votes, by the mayor and aldermen, under the provisions of the statutes; and a recount was denied them, under the advice of the city solicitor of Lynn, upon grounds which the committee think were technical in the extreme.

In regard to the first ground relied upon, to wit, the closeness of the vote, the committee are unanimously of the opinion that such a fact, of itself, constitutes no ground for a recount by the

legislature. It is believed that the presumption is in favor of the accuracy of the constituted officers, whose duty it is to count the votes, and that, unless facts or circumstances are shown, which tend to throw some reasonable doubt upon the correctness of their work, the committee are not called upon to reopen the matter, and recount the votes, simply because the contestant came very near being elected. They are led to this conclusion, not only upon the principles already stated, but also upon consideration of the probability that, if it were once admitted, as a sound rule, that anybody who ran very close to his successful competitor could come to the committee on elections of the legislature, as a sort of appellate returning board, future committees would be overburdened with petitions of that character. This view has been uniformly sustained, by previous legislatures, and has been substantially adopted by this house, in the case of *Morse* v. *Lonergan*, *ante* p. 288. Your committee, therefore, are of the opinion that the fact that the sitting member appears to have received but one or two votes more than the contestant, furnishes no ground whatever for a recount by the committee.

The same considerations appear to dispose of the third ground upon which it is alleged a recount should be had here. Granting, for the moment, that the mayor and aldermen were unwise in refusing the petition of the citizens for a recount, the committee do not think that fact of itself furnishes any ground for its action at this time. It would undoubtedly have been much better, so far as the committee are able to judge, for the mayor and aldermen to have granted the petition, and not to have inquired too closely into the form of the petition, thus following the practice of nearly all, if not all, the cities in the Commonwealth, in such matters; but the committee do not, for that reason, consider that it is a part of their duty to supply the omissions of other bodies, or avenge or redress the grievances which parties may have sustained at their hands, considered simply as such. To ascertain who has been legally and truly elected to the house of representatives, in such cases as are referred to them, is the sole duty of this committee, and unless there is evidence tending to satisfy the committee that there has been, on the one hand, fraud or illegality, in the manner of calling, holding or conducting the election, or, on the other hand, that there may have been an error in the count, the return of the duly constituted officers is not to be disturbed.

Having disposed of the first and third grounds alleged for a recount, it remains to consider the second allegation, to wit, that different statements were made, at various times, by the ward officers, as to the result of the vote, and that, therefore, no substan-

tial reliance is to be placed upon their count. On this point the committee had before them the warden, two of the three inspectors, and the clerk, as witnesses, one at least of whom was of the same political predilections as the contestant. They all testified fully, as to the counting and recounting of the votes for representative, and, so far as their testimony agreed, it was as follows: At intervals during the day, the votes were taken from the ballot-box and sorted and counted by the clerk and one of the inspectors, so that, at the close of the balloting, the tickets, except a few then remaining in the boxes, had been all assorted into packages, as regular republican, regular democratic, and scattering, and counted, and the vote was at first declared from this count, to wit: —

Walden,	552
Chadwell,	541

with a number of scattering votes.

Before completing the count of the ticket, however, it was discovered that some votes had been classed as regular republican, that were what the witnesses called "spurious," or "counterfeit"; that is, they were tickets precisely similar, in form and appearance, to the other tickets, except that they had Chadwell's name instead of Walden's. A number of these were found, which had been classed as straight republican, — enough, if counted correctly, to have elected Chadwell instead of Walden. Some other errors were discovered, in Mr. Walden's favor, though, on this point, as to the number of errors discovered, the witnesses remembered differently, or did not remember at all. In consequence of these errors, the ward officers determined to recount the whole vote for representative. Accordingly, after completing the count for the remainder of the ticket, the ward officers took the ballots, for the purpose of recounting, carefully and deliberately, the votes for representative. The ballots were first assorted, in a number of different sized packages, each package, however, containing but one kind of votes. Thereupon, all being seated around a table, one of the inspectors, Mr. Skinner, first took the packages, counted the votes in each package, examining each vote in reference to the name of the candidate for representative upon it; and having marked the number of votes in each package, on the back of the package, passed it to another of the inspectors, for his examination. This second inspector thereupon counted the packages separately, as he received them from the former, and, finding the classification and the number correct, passed the packages, as he counted them, to the third inspector. The third inspector (the only officer not present before

this committee) counted the packages, in the same manner as the others, and passed them to the warden, who, with the clerk looking on, counted the packages over, as the others had done; and finding their count correct, the clerk set down the numbers, and, by adding, arrived at the figures already given as the official return of the vote. The original paper, on which the figures were set down, was produced before the committee, showing the computation to be correct.

On all these facts, the witnesses (comprising all the ward officers, excepting one inspector) substantially agreed; and all of them furthermore stated, that they had no doubt the count was correct; and each one stated that he individually satisfied himself of the correctness of the count, being led to do so on account of the discrepancies appearing after the first announcement. As to the number of the "spurious" ballots found, they did not remember alike; and no one of the witnesses was able to state the errors found, so as to account for the change from the first announcement to the second; although some of the witnesses remembered errors in the first summing up, that escaped either the attention or the memory of the others. But they all agreed that the errors were such that they unanimously decided to recount, which they did, in the very careful manner already described, and with especial and sole reference to the vote for representative. The inspector who counted and marked the packages, on cross-examination, could not swear positively as to the particular manner in which he marked the packages, after counting them, and whether he did not, in some instances, use the marks already on the packages, when they were right; but he was certain that he indicated, in some plain way, the number of the votes, for the guidance of those who counted after him.

On these facts, the majority of the committee do not see that there is probable ground for believing that the count, as finally made, was not correct. On the contrary, it appears to them, that no fairer, better, more careful, or more impartial count could be had. It was not the case of the simple discharge, by the officers of the precinct, of an official duty, where ordinary care only was exercised. It was, substantially, four separate and independent counts, by each one of the ward officers, made under circumstances that were a guarantee of the care and accuracy of each. It appears that, after the discovery of the "spurious" ballots, the reports had somehow gained currency, that Chadwell was elected, while their first announcement had elected Walden. In view, therefore, of the uncertainty in the popular mind, to correct their own errors, and to get the vote, if possible, right, they set to work deliberately, after

finishing their other work, to recount the vote. They represente the different political parties, and were apparently animated sole by a desire to ascertain the truth. Each one counted all the ballo for himself, and they all agreed as to the result. Care could n go further; and it is not presumable that this committee would b any more likely to arrive at the truth, than were those five officer against whom was imputed, at the hearing, not the slightest su picion of fraud, unfairness, or prejudice. It would be simpl putting the count of seven members of this legislature over th count of the five officers of the ward, which, under the circumstance there does not seem to be any sound reason for doing.

It is the duty of the committee to see that justice is done a parties; but this includes the sitting member, as well as the co testant; and it does not seem to the committee just to a sittin member, to subject the question of his right to a seat, when th question is merely one of computation, to a committee of this hous and when that committee cannot show themselves to be likely to b more fair, more careful, or more impartial, in coming to their conclu sions, than was the board charged by law with determining the resul

The majority of the committee, therefore, believing that justic will not be promoted by a recount, recommend that the petitioner have leave to withdraw.

[A minority report in favor of recounting the votes for repre sentative was submitted by Messrs. Babson, Wilde, and Ingalls. A motion to substitute the minority report, for that of the majority was lost by a vote of 77 yeas to 95 nays. H. J., 1877, p. 105. Th report of the committee was then accepted. *Ib.* p. 105. A motio to reconsider the acceptance of the report was lost, by a vote o 85 yeas to 108 nays. *Ib.* p. 109.]

Francis P. Merriam *v.* Francis E. Batchelder.

House Document, No. 33. January 29, 1877. Report by W. W. Wilde

Mistake in Name of Candidate. Votes for "F. P. Merriam of Middleton" will b counted for Francis P. Merriam of Middleton, in an election controversy, upon proo that the latter is the only voter of the name in Middleton; was nominated under th name of "F. P. Merriam;" and that, at the election, his initials were used in on town, on account of doubt as to his Christian name.

Eligibility. Inhabitancy. A representative, who was born, always lived, been assessed, and voted, in the town from which he was elected, owning and occupying, with his family, a home there, from which he had no intention of removing, but always considered it his home, will not be *held* to have changed his domicile, and become ineligible to election, because for two winters he has, with his family, lived in a house in Boston, belonging to his wife and her brother, and, during his stay, has kept house there with his brother-in-law.

RUSSELL H. CONWELL *for petitioner.*
ISRAEL W. ANDREWS *for sitting member.*

The Committee on Elections, to whom was referred the petition of F. P. Merriam, for the seat in this house now occupied by Francis E. Batchelder, having duly considered the same, submit the following report: The district in question is the thirteenth Essex district, comprising the towns of Middleton, Topsfield, Saugus and Lynnfield, electing one representative. The total vote of this district for representative, was as follows: —

Francis P. Merriam of Middleton had . . .	386
F. P. Merriam of Middleton had	263
Francis E. Batchelder of Middleton had . . .	402

The votes for F. P. Merriam were all cast in the town of Saugus, and there was abundant evidence, tending to show that Francis P. Merriam of Middleton was the person intended. It appeared that Francis P. Merriam of Middleton, the contestant, is well known in the district; is the only voter of that name in the town of Middleton, and was nominated under the name of F. P. Merriam at the caucus of the party upon whose tickets his name was voted; and that there was no other person in Middleton named Merriam, except James M. Merriam, the brother of the contestant. It was also shown, that the use of the initial, instead of the first name, *Francis*, in Saugus, was in consequence of a doubt as to what the contestant's first name really was.

This evidence was not disputed, and upon it the committee think there can be no doubt that the votes for F. P. Merriam should be counted for the contestant, thus giving him a majority of 247 over the sitting member, and clearly entitling him to represent the district.

The sitting member contended, that the contestant was not eligible, by reason of non-residence, and introduced evidence to show that the contestant, during the past two winters, has come to Boston, with his family, stopping at a house on Newbury Street, belonging to his wife and his brother-in-law jointly; he and his brother-in-law keeping house together. And it appeared that, during the past year, his family had passed the greater portion of

their time in this house. But, on the other hand, it was proved by the contestant, that he was born and has always lived in Middleton; that he has voted there for twenty-eight years, including the last election; was assessed there; owned and occupied, and still owns and occupies, with his family, a house there; and he himself testified, that he had never had any intention whatever of leaving Middleton; and that his home was still there, as it always had been.

On all the evidence, the committee thought there was no doubt that the contestant was, and is, a resident of Middleton, and eligible to the office.

The committee therefore unanimously report the accompanying resolution.

[The resolution declared that the petitioner was entitled to the seat. The resolution was adopted. H. J., 1877, p. 117. Mr. Merriam qualified, and took the seat. *Ib.*, p. 128.]

George F. Scribner *v.* Patrick Keyes.

House Document, No. 52. February 7, 1877. Report by Thomas M. Babson, — Mr. Winslow dissenting.

Recount of Votes refused. The fact that, at the city election, immediately following the election of representative, a recount of votes for certain city officers was made by the aldermen, and showed that few, if any, of the returns made by the ward officers at such city election, were correct, and that, at the election of representative, in some cases partial counts of votes were made, by one ward officer, and were not verified by any of his associates, is insufficient ground even if proved, for a recount of votes for representative, by the house of representatives.

Eligibility. Inhabitancy. Where the representative returned had lived, with his family, in a tenement over a store owned by him in the district, and, in July previous to his election, had moved his family and furniture into a house owned by him in the country, outside the district, moving there on account of the health of his family, letting his former tenement, but with the right to resume it in the fall, remaining in the country until the last of October, when he returned, with his family, and occupied another tenement in the same building, never intending to change his residence, but merely to spend the summer in the country, it was *held*, that he remained an inhabitant of the district from which he was elected, and was eligible to election.

Practice. Quære: whether, under a petition for a seat as representative, not asking for a recount of votes, the petitioner can, at the hearing, request such a recount.

Charles Cowley *for petitioner.*

Theo. H. Sweetzer *for sitting member.*

The Committee on Elections, to whom was referred the petition of George F. Scribner, for the seat of representative from the twentieth Middlesex district, now occupied by Patrick Keyes, and a petition in aid of the same, have duly considered the same, and report as follows: The petitioner, in support of his claim that said Keyes was not legally elected as representative from said district relied in his petition on two grounds.

1. That said Keyes did not receive a majority of the legal votes, cast in the district for representative, on the 7th day of November, 1876.

2. That said Keyes was not eligible as a representative, for the reason that he had not been an inhabitant of the first ward in the city of Lowell (comprising the twentieth Middlesex district), for at least a year next preceding his election.

In support of his claim, that Keyes did not receive a majority of the votes cast in said ward, at said election, and that the petitioner did, the counsel for the petitioner asked the committee to recount the votes cast in said ward. The counsel for the sitting member objected to the committee's entertaining such request, for the reason that the petition did not ask for a recount. The counsel for the petitioner, being requested by the committee to state on what grounds he asked for a recount, replied that he expected to prove that after the city election, held in Lowell immediately after the state election, a recount was asked for, and made by the board of aldermen, and said recount showed that few, if any, of the returns of votes made by the ward officers, at said city election, proved to be correct; and he also offered to prove that, at the state election, in some cases, partial counts of votes were made, by one ward officer, and were not afterwards verified by any of his associates. The committee ruled that, even if these facts were proved, without proof of some other facts, tending to show a probable mistake made in the count of votes at the November election, these alone would not be sufficient ground for a recount by the committee. This ruling rendered unnecessary a decision on the point raised by the sitting member. The petitioner, after this ruling, offered no evidence in support of his first allegation.

In support of his second allegation, that Mr. Keyes had not been an inhabitant of the district, for at least a year prior to his election, the petitioner called Mr. Southwick, who testified substantially as follows: That he was an inhabitant of Lowell, and had known Mr. Keyes, the sitting member, for many years, and was the opposing candidate to Mr. Keyes in 1875, and was elected to the legislature over Keyes, in that year. He testified that he had known of "Keyes' Block," in Lowell, for many years; that

it was on Market Street, and within the twentieth Middlesex district; that in the first story of this block, which was brick, and owned by Mr. Keyes, Mr. Keyes kept a grocery store, and that over the store were tenements, occupied by different families, in one of which Mr. Keyes had lived for some years, and in one of which he was living at the present time; that he also knew of a house in Pawtucketville (which was out of the district, in ward 5), owned by Mr. Keyes; that the house was a large white house, and had about an acre and a half of ground around it; that Mr. Keyes lived in this house, in Pawtucketville, during August and July, 1876; and that, some day in July, he met Mr. Keyes in the road near his (Keyes') house, in Pawtucketville; that Keyes stopped him, and, after some conversation on other topics, Mr. Keyes said, "You will have an easier field this fall, if you run for the legislature again; you will have a weaker candidate than I against you; I shall not be in the ward to trouble you any more; I have moved out here, and Mr. Durgin will probably be the candidate against you." The petitioner also called Mr. Hartwell, formerly a representative from ward 5, in Lowell, who testified substantially as follows: That some time in October, just before the nominations, he called on Mr. Keyes at his (Keyes') store, and advised him not to be a candidate for the legislature, as he could not hold his seat if elected, and that Keyes told him that he moved to Pawtucketville at the advice of his physician, and for the benefit of his children's health, and that he intended to move back soon; that after Keyes' nomination he again called on him, and again expressed his fears that he (Keyes) was not eligible, and referred to the Shaw case. Keyes replied that he had consulted eminent lawyers, in Lowell and Boston, and that he was all right, and could hold his seat. At one of these interviews, — the minutes of the committee do not agree as to which one, — Mr. Keyes told Hartwell, that he had not moved out of the ward; that he only went to Pawtucketville to pass the summer, for the benefit of his children's health. The petitioner called Mr. Garrity, who testified that he was a plumber, and in October, 1876, did some plumbing at Keyes' house in Pawtucketville, where the Keyes family was living at that time; that while he was there, he had a conversation with Mr. Keyes about his (Keyes) being a candidate for the legislature, and told Keyes that he could not hold a seat in the house if elected, and spoke of the "Shaw case," and Mr. Keyes told him that his case was different from "Shaw's," as he (Keyes) intended to move back to his district, and that Shaw did not. The petitioner here rested his case.

Patrick Keyes, being called, testified that he had lived in that

part of Lowell comprised in the twentieth Middlesex district, i
thirty years; owned a brick block there, with a grocery store
it, and tenements over the store; said he had lived in one of the
tenements more than ten years; that, on the 2d day of Ju
1876, he moved his family and furniture to a house he owned
Pawtucketville, to spend the summer; that he stayed in Pa
tucketville until the last of October, when he moved back to
house in ward 1; that he moved to Pawtucketville with the
tention of moving back in the fall. He explained his moving
July, by saying that some of his children were sick in June, a
that the doctor told him to take his family into the country
the summer; that he told the doctor times were hard, and th
he could not afford to go into the country, but had a house
Pawtucketville, which was vacant, and he would go out there a
pass the summer; the doctor told him that that would do, a
advised him to go there, and so he (Keyes) did so. He testifi
that the house in Pawtucketville, though only fifteen minut
walk from his store, was in a sparsely-settled neighborhood; h
an acre and more of ground around it, and was near woods, whe
his children could play. He testified that he never intended
move out of ward 1, and denied that he had ever told Southwi
that he had moved out of the ward, but said he told him that
had moved to Pawtucketville for the summer, and afterwards to
Southwick that as he (Keyes) did not intend to be a candida
the next fall, he (Southwick) would have an easier time
getting elected, as Durgin would probably be the candidate
the democratic party. He also testified, that when he left
tenement on Market Street, he let it to one Dennis O'Neil, a
arranged with O'Neil that he (Keyes) should have possessio
whenever he wanted to move back, in the fall. He also said th
he did not let one room, but retained it, and stored in it trunk
containing the winter clothing of the family, and some oth
articles. On cross-examination, he said that, when he did mo
back in the fall, he did not take possession of the tenement he
to O'Neil, but another tenement in the same block, which w
then vacant.

Dr. William A. Hoar, called by the sitting member, testifi
that two of Mr. Keyes' children were sick in May, and that
recommended Keyes to move out of town for the summer, givi
substantially the conversation as testified to by Mr. Keyes.

Dennis O'Neil, called by the sitting member, confirmed the sto
as to the conditional hiring of the Keyes' house by him, and th
he was to move out when Mr. Keyes wanted the tenement, in t
fall. Martin Fay of Boston testified, that he went to Keyes' hous

on Market Street, in Lowell, on the 27th of June, and passed the night there; found Keyes making preparations to move, and asked him where he was going to move to, and Mr. Keyes told him that he was going to move to a house he owned in Pawtucketville, for the summer, for the health of his children, and was coming back in the fall.

The sitting member also called Israel Putnam of Chelmsford, and Frank Brady, Oliver Flint, and Mr. Casey, of Lowell, who testified to conversations with Keyes, during the summer of 1876, at different times and places, in all of which Mr. Keyes announced his intention of moving back to his old house in the fall, and said he was only passing the summer in Pawtucketville, for the benefit of his children's health. The great preponderance of evidence going to show that the residence in Pawtucketville, during July, August, September and part of October, was a substitute for the passing of the summer in the country, so common among city families, your committee are of the opinion that the sitting member still continued to be an inhabitant of ward 1, during his temporary sojourn in Pawtucketville, and that his legal domicile was, during that time, in the ward from which he was elected. The committee, therefore, report that the sitting member is entitled to his seat, and that the petitioner have leave to withdraw.

[The report of the committee was accepted, H. J., 1877, p. 153]

Abel G. Haynes *v.* John Hillis.

House Document, No. 64. February 12, 1877. Report by H. M. Knowlton, *Chairman*

Failure of Clerks to meet within prescribed Time to ascertain Result. Where the clerks of the four towns composing the representative district, did not meet on the day following the election, to compare transcripts of the records of votes, and ascertain who was elected, but two only of the four met, and signed a certificate in blank, which a few days later was signed by another of the clerks, who called and left his transcript, and afterwards the fourth clerk appeared and, with the clerk having possession of the certificate, filled the blanks from the returns of the several clerks, it was *held*, that the return and certificate, so made, were invalid and must be set aside.

Effect of invalid Certificate. Where the certificate of an election is invalid, the election is not necessarily avoided, but the result may be ascertained by other means. And in such case, the result will be ascertained by examination of the official town records of the vote, especially where the ballots in three of the towns have been destroyed (no notice for their preservation having been served on the clerks).

he Committee on Elections, to whom was referred the petition of Abel G. Haynes, for the seat in this house now occupied by John Hillis, having considered the same, submit the following report:

The district in question is the twenty-seventh Middlesex, comprising four towns; viz., Maynard, Wayland, Sudbury and Weston.

The contestant relied chiefly on the fact, which he proved to the satisfaction of the committee, that the clerks of the several towns comprising the district did not meet, as required by law, to compare the vote of the several towns, and to issue the certificate of election provided by law. The law provides, that the vote for representative in each town shall be recorded in open town meeting, and a transcript of such record shall be delivered forthwith to the clerk. On the noon of the day following the election, the clerks shall meet, at a place designated, to examine and compare such transcripts, ascertain who has been elected, and make out certificates of election.

In this district, the clerks paid no attention whatever to these plain provisions of law. They not only did not meet at the required time: they have never met at all. The designated place of meeting was in Wayland. It appeared that the Sudbury clerk came over at the proper time, and met the Wayland clerk; and, as the others did not appear, they signed a certificate in blank, and separated, the Wayland clerk keeping the blank. A few days after, the Weston clerk came and signed the blank, and left his transcript. Last of all came the Maynard clerk, and he and the Wayland clerk filled up the certificate, from the returns of the several clerks, which they had left for the purpose. The whole proceedings were in violation of the terms of the statute, and indicated a degree of negligence, on the part of some of the clerks, that the committee think cannot be too severely censured.

The necessity for the observance of these provisions, and the consequence of a failure therein, were ably and exhaustively discussed in the case of *Stimpson* v. *Breed*, *ante*, p. 257, the facts of which were similar to those of the present case; and the com-

mittee see no ground to question the correctness of the conclusions arrived at therein: to wit, that the return and certificate, made under the circumstances above stated, in direct disregard of the provisions of a peremptory statute, are invalid and must be set aside.

The certificate under which the sitting member holds his seat thus being void, the committee deemed it their duty, it appearing that the election itself was regularly conducted in all respects, to ascertain who was elected, so that the district might neither be deprived of its representation, nor be obliged to hold another election, in consequence of a mere failure of duty on the part of the town clerks. To avoid the certificate is not necessarily to avoid the election. The votes are properly cast, regularly counted by sworn officers, and the result recorded in open town meeting; and no subsequent omissions could affect the regularity of these proceedings. In this view, also, they were sustained by the authority of *Stimpson* v. *Breed*, *supra*.

Having decided to ascertain the result of the election, independently of the certificate, the committee discussed, somewhat, the way in which this should properly be done.

In the case of *Stimpson v. Breed*, above referred to, the ballots were sent for, and counted by the committee having the case in charge. But as the ballots have been counted once, by officers charged with that duty, and the result made matter of record, in open town meeting, your committee are unable to see why they are not authorized to *ascertain* — presuming that the town officers have done their duty, in respect of the counting and recording, there being no evidence to the contrary,— the result of the election by examination and comparison of these records. The clerks, if they had met, would have proceeded in that manner, and your committee are unable to see why they may not use the records as evidence, to the same effect as the board of clerks could have done. When the statute makes the returns sufficient evidence for the clerks, from which to ascertain the result of the election, why may not your committee, supplying the omissions, and doing the duty of the clerks, receive and act upon the same evidence?

In this case, however, it did not become necessary to decide this point; for, in respect of three of the towns, no notice was served upon the clerks, to prevent them from destroying the ballots, as by law they are required to do, at the end of sixty days, if not notified to the contrary, and it was not disputed that the record of the votes in these towns was as follows: —

	Hillis.	Haynes.
Maynard,	88	202
Sudbury,	111	117
Weston,	130	79

In respect to the remaining town, Wayland, the committee, having the ballots before them, decided, upon other grounds, to recount them, which they did, with the following result: —

Wayland	232	148
Total vote of the district,	561	546

It thus appears that Mr. Hillis, the sitting member, was elected by a plurality of 15.

The committee, therefore, recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1877, p. 177.]

D. M. PRESCOTT ET AL. *v.* E. J. CROSSMAN.

House Document, No. 84. February 15, 1877. Report by H. M. KNOWLTON, *Chairman.*

Recount of Votes refused. The fact that the votes for representative were counted by a number of ward officers, and the count of one officer was not always verified by the others, and that, at the subsequent city election, the same officers made a number of gross errors in counting votes, will not, if proved, be sufficient ground for a recount of votes by the house of representatives.

Bribery. The distribution among voters of checks redeemable in liquor, cigars, etc., at a saloon near the polls, and the distribution in the ward room, at noon, during the election, of a small quantity of refreshments, by members of the political party of which the sitting member was the candidate, — the expenses of the campaign being paid by him and others, — if such acts are not shown actually to have influenced voters, or to have been authorized, consented to, or knowingly ratified by such member, will not invalidate the election.

Eligibility. Inhabitancy. Where the member returned as elected in 1876, had lived some years in the district, and, upon the burning of his house in November, 1875, took board in a house out of the district, but soon after the fire made preparations to rebuild, the work continuing to the time of the election, and always intended to live in the house when completed, it was *held*, that he continued an inhabitant of the district and was eligible to election.

The Committee on Elections, to whom were referred the petition of D. M. Prescott and others, that the seat as representative from

the twenty-second Middlesex district may be given to Thomas R. Garity, and the remonstrance of Geo. A. Cheney and others, against the admission of E J. Crossman as representative from said district, submit the following report: The district in question is the twenty-second Middlesex, comprising ward 3, in Lowell, electing one representative. The petition set forth three several allegations, no one of which was proved to the satisfaction of the committee.

1. The first allegation was, that the sitting member had not, for one year previous to his election, been an inhabitant of the district, and consequently was ineligible. The evidence submitted, proved to the satisfaction of the committee the following facts: Mr. Crossman, the sitting member, came to Lowell to reside some years ago, and for several years occupied, in common with his daughter and her husband, a house on Highland Street, in the district. Mr. Crossman has had no family (excepting this daughter) for some years. This house on Highland Street was burned Nov. 29, 1875; and, thereupon, Mr. Crossman and his daughter separated. He went to board at a house on Alder Street, out of the district, where he has continued to board up to the present time; and the daughter went in another direction, also out of the district, and went to keeping house again. Soon after the fire Mr. Crossman caused the foundations and cellar of the burned house to be boarded up, for protection from the elements; and in the spring he made a contract for rebuilding. The work of rebuilding began in July, and has been going on without interruption since that time, excepting a few weeks in the fall, when the carpenter was otherwise engaged. The house is now nearly ready for occupancy, and Mr. Crossman intends to occupy it as soon as it is ready, and has rebuilt it with that intention. A few of the things in the cellar were never moved at all; such as the furnace, coal and wood, garden tools, and some other articles of like nature. Without Crossman's knowledge, the assessors assessed him, the last year, in ward 6; but upon the tax bill being presented to him in September, he declared it was incorrect; and he went forthwith to the assessors, and had the correction made, and his name restored to the ward 3 list.

The above was all the evidence material to the issue, and upon it the committee are unanimous that the sitting member has clearly been, within the meaning of the Constitution, an inhabitant of the district from which he was chosen, during the whole of the year preceding his election. His absence from the district was temporary, induced by necessity, and with a fixed, definite and continuing intention of return. All the elements which constitute a termination of residence are wanting, excepting the single one of bodily absence, and that has always been considered to be of at least

minor importance among the facts necessary to establish a change of inhabitancy.

2. It was alleged that the votes were erroneously counted, and the counsel for the petitioners proposed to show, in support of this, that the votes were counted by a number of the ward officers, and that the count of one officer was not in all instances verified by the others. He also proposed to show that, at the December election, the same officers made a number of gross errors in counting votes. The committee thought that these facts, if proved, constituted no reason for a recount, and declined to hear the evidence.

3. The petition alleged that various irregularities were practised, to secure the election of the sitting member. The evidence on this point was generally to prove the hiring of a large number of vote distributors; the distribution of a number of checks among the voters, redeemable in liquor, cigars, etc., at a saloon near by, and the distribution of a small quantity of refreshments, at noon, in the ward-room. All these things were done, at the instance and under the direction of certain members of the political party of which the sitting member was the candidate, and, subsequently, he and other candidates of the party contributed to pay the bills of the expenses of the election; but it did not appear that he knew, or had any reason to know, the specific purpose to which the money was applied.

Your committee, while unanimous in condemning some of the acts proven to have been done, as inconsistent with the purity of the elective franchise, were divided upon the question, whether an election of representative should be set aside, upon proof of general irregularities, like those above referred to, or whether there should not be specific evidence of bribery of voters, sufficient, if the corrupt votes were excluded, to change the result. The cases cited by the petitioners' counsel, — *Bradford*, 1 O'Malley and Hardcastle's Election Cases, 35; *Poole*, 2 do., 123; and *Kidderminster*, 2 do., 177, — point very strongly to the former position; but they are all English cases, decided upon statutes governing elections much more strict than anything in Massachusetts. The committee, however, did not deem it necessary to decide the question, as the evidence failed to satisfy them on two material points, viz.: —

First. That any of the acts proven actually had any influence upon the minds of the voters.

Second. That (even admitted that undue influence was exercised) the sitting member authorized, consented to, or knowingly ratified, the same. The proof failing, in these two essential

points, the committee think the election should stand. *Williams'* case, Cushing S. & J. 383. *Vide*, also, *Keeler's* case, Cushing S. & J. 55.

The committee therefore unanimously recommend that the petitioners and remonstrants have leave to withdraw.

[The report of the committee was accepted. H. J., 1877, p. 197.]

JOHN OSBORNE, JR., *v.* PATRICK H. HALLINAN.
FRANCIS HAYDEN *v.* EDWARD J. JENKINS.

House Documents, Nos. 181, 182. March 15, 1877. Reports by H. M. KNOWLTON, *Chairman*.

[In these two cases, the petitioners respectively claimed the seats of two sitting members, on the ground that neither of the latter had been, for one year next preceding the election, an inhabitant of the district from which he was elected, as each, having been an alien, was naturalized during that year. The opinion of the justices of the supreme judicial court was requested, upon the question whether persons, otherwise qualified, who had been naturalized within the year, were eligible to election as representatives. The opinion, that such persons were eligible, is reported in *Opinion of Justices*, 122 Mass. 594, and in the supplement hereto. Following the authority of that opinion, the committee reported, in each case, that the sitting member was eligible, and that the petitioners have leave to withdraw. The reports of the committee were accepted. H. J., 1877, p. 314. PATRICK A. COLLINS appeared for petitioners, and CHARLES J. BROOKS for sitting members.]

SENATE—1878.

ıl Committee on Returns of Votes for Senators — Hon. JONATHAN ITE, Hon. JAMES C. ABBOTT, Hon. HOSEA M. KNOWLTON, Hon. RAHAM B. COFFIN and Hon. HENRY C. EWING.

FRED. W. CLAPP *v.* LUTHER H. SHERMAN.

e Document, No. 57. February 14, 1878. Report by Mr. WHITE, *Chairman*, — Messrs. ABBOTT and EWING, dissenting.

nent of Votes refused. The fact that the aggregate vote returned for governor, natorial district, exceeds, by 263, the aggregate vote returned for senator, will ıtify a recount of votes for senator.

nent of Votes granted. Where, after the count of votes for representative in a before the declaration of the result, a recount of those votes only was made selectmen, and an error found in the original count, amounting to a greater r of votes than the plurality by which the sitting member was returned as l senator in the district, the votes for senator in that town will be recounted by ıate.

nent of Votes in whole District refused. But votes for senator, in the other in the district will not be recounted in the absence of proof tending to impeach ords and returns in those towns, the presumption being in favor of their ac-. And this presumption attaches to the several returns, and not simply to gregate.

ıe Committee on the Returns of Votes for Senators, to whom referred the petition of F. W. Clapp, for a recount of votes e fourth Middlesex senatorial district, having met the peti-r, and the sitting member, Hon. Luther H. Sherman, — both es appearing by counsel, — and having heard their statement, nce, and arguments, submit the following report: The peti-r, having in his petition set forth no reasons for the granting e prayer therein contained, furnished to the committee, upon request, a specification of the grounds of his claim for a ınt, which was as follows: "*First*, That there is a difference een the number of votes thrown for governor, and the number otes thrown for senator, of 263 in favor of the governor's ; while the interest and attention, throughout the district, ın the senatorial contest more than in the gubernatorial.

Second, That great carelessness was manifest in the countin of the votes; one instance, especially, being in the town of Natic where a package of about 60 ballots was not counted at all; an these ballots were of that party, a very large majority of who were in favor of your petitioner for senator. All of whic specification your petitioner is fully prepared to prove." I relation to the second allegation, it appeared in evidence, that th sorting and counting of the ballots, in the first instance, in th town of Natick, was delegated by the selectmen to two citizen of the town designated by them; the selectmen acting therei apparently, upon the supposition that the selection of person from opposing political parties would afford all the protectio against fraud and mistake in the count which was intended to b secured by the provisions of law in that regard, — a supposition the committee may remark, in passing, which they believe to b not unfrequently entertained and acted upon.

These two counters were called as witnesses, one on behalf the petitioner, the other on behalf of the sitting member. The testimony concerning any certain distinct package of uncount ballots was vague and conflicting, and, taken together with other testimony bearing upon that point, would not, in the opini of the committee, have justified the finding, nor even afford reasonable ground for supposing that there was any such packag It was, however, in evidence, and undisputed, that after the fi count was completed, and just before the final public declarati of the vote, upon the suggestion of some one, a recount was ha by the selectmen, of the votes for representative for the Nati district, by which it appeared, that the several candidates for th office had together gained 57 votes over the first count. Some the witnesses testified, in explanation of the error, that it aros and was at the time supposed by all parties to have arise from a mistake on the part of the clerk in recording the count ballots for that single office; that, in fact, the suggestion of recount originated in the unexpected result of the balloting fc representative alone. The evidence, wholly uncontroverted, th all parties acquiesced in the action of the selectmen, in confinin their recount to votes for that office, and that no one claimed requested a recount in the case of any other officer, made the ex planation a plausible one.

Nevertheless, the committee were of the opinion, that th acknowledged error in the case of the representative — an err to an amount exceeding the plurality of votes for the candidat declared by the official returns to be elected senator — rendered proper that there should be a recount, by the committee, of ballot

last for the latter officer in the town of Natick. Such a recount was accordingly had, with the following results: —

Whole number of votes cast,	1,063
For senator of fourth Middlesex district, —	
Fred. W. Clapp,	526
Luther H. Sherman,	453
—— Gill,	84

There were also 81 ballots, on which no vote appeared for any candidate for senator. No evidence whatever was produced or offered, on behalf of the petitioner, of any irregularity in the doings of the towns in the district, other than the town of Natick. There was no evidence before the committee, to impeach in any way the records and returns of those towns, in the matter of the election, whether of senator or any other officer. The natural and legal presumption, therefore, in favor of the correctness of the official returns, remained in full force and unimpaired, so far as those towns were concerned; a presumption which must, in the nature of things, attach to the several returns, and not simply to the aggregate. The committee were of the opinion, that, under such circumstances, neither precedent, nor the reason of the thing, required them to recount the votes of those towns.

Inasmuch, therefore, as, by the recount of ballots cast in the town of Natick, it appears that the plurality in the aggregate vote of the senatorial district, in favor of the sitting member over that in favor of the petitioner, as given by the official returns, — namely, 37, — is reduced by one vote only, the committee find, and report, that the sitting member, Hon. Luther H. Sherman, is entitled to the seat now occupied by him, and recommend that the petitioner have leave to withdraw.

[Messrs. Abbott and Ewing submitted their views, as a minority. The report of the committee was accepted. S. J., 1878, p. 117.]

HOUSE—COMMITTEE ON ELECTIONS, 1878.

Messrs. NATHAN M. HAWKES of Lynn, *Chairman;* THEODORE D. BEACH of Springfield, ABIATHAR DOANE of Harwich, FRANCIS GARGAN of Boston, WILLIAM MANNING of Chelmsford, JOHN W. CURTICE of Hinsdale and HENRY PADDOCK of Nantucket.

DENNIS O'CONNOR *v.* JAMES L. LOCKE.

House Document, No. 14. January 24, 1878, Report by NATHAN M. HAWKES, *Chairman.*

Recount of Votes refused. Where votes have, upon petition, been recounted, by the board of aldermen, such recount must stand, unless it is shown that, in such recount, clerical or other errors were made; that there was carelessness or fraud; or that some other cause existed, which in the case of ward or town officers, in the primary count, would have been good ground for a recount; and the votes will not be recounted by the house of representatives, merely because the recount by the board of aldermen differed from the original count, and changed the originally declared result.

THOMAS J. GARGAN *for petitioner.*
JOHN H. GEORGE *for sitting member.*

The Committee on Elections, to whom was referred the petition of Dennis O'Connor, for a recount of votes for representatives in the eighth Suffolk district, have duly considered the same, and report as follows:

The eighth Suffolk district comprises the eighth ward of the city of Boston, and elects two representatives.

By the return of the ward officers the votes (excepting the scattering) were as follows: —

Francis Gargan,	788
James L. Locke,	605
Dennis O'Connor,	681
Charles Jarvis,	519

Upon petition, the votes for representatives in the district were recounted, agreeably to law, by the board of aldermen of the city of Boston. The result of the count by the aldermen was as follows:

Francis Gargan,	667
James L. Locke,	625
Dennis O'Connor,	562
Charles Jarvis,	542

The scattering votes are also omitted in the recount.

The ward officers' returns would have elected Messrs. Gargan and O'Connor. The recount elected Messrs. Gargan and Locke, to whom certificates of election were given.

Mr. O'Connor asked for a recount; but he alleged no fraud, nor pointed out any errors in the recount.

His ground for asking a recount by the house was that there had been counts by two boards of officers; that these counts had been different, had led to different results, and consequently he appealed to the final tribunal to decide between the two.

The sitting member, holding a certificate of election, has a *prima facie* case, and his title is not to be put in peril, unless some good reason is given.

The committee consider that a recount by the board of aldermen must stand, unless it is shown that clerical or other errors were made; carelessness or fraud or any other cause existed, which, in the case of ward or town officers, in the primary count, would have been good ground for asking a recount.

The committee deem it their duty to establish no precedent, tending to make common the habit of appealing to the house to recount votes, when no valid reason exists for such course.

The committee, therefore, report that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1878, p. 77.]

WILLIAM P. MACOMBER *v.* CHARLES FISHER.

House Document, No. 37. January 31, 1878. Report by NATHAN M. HAWKES, *Chairman*.

Name of Candidate on Ballot. Presumption. Where there are several persons of the same name, in the district, each of whom is eligible to election as representative, and one only of whom has been designated as a candidate, ballots bearing that name are, in an election controversy, by a reasonable intendment, without further designation, presumed to have been cast for that candidate.

Same. In a district composed of the towns of Westport and Dartmouth, votes for "William P. Macomber" will be counted for William P. Macomber of Westport, although there is another person of that name in Dartmouth, eligible to election,

upon proof that William P. Macomber of Westport was a regularly nominated candidate; that it was understood by both parties that the candidate that year should be from Westport; and that it was the intention of the voters to vote for him.

ALANSON BORDEN *for petitioner.*

The Committee on Elections, to whom was referred the petition of William P. Macomber, for the seat as representative from the seventh Bristol district, now occupied by Charles Fisher, having considered the same, submit the following report: The seventh Bristol district embraces the towns of Westport and Dartmouth, and elects one representative.

There was substantially no dispute concerning the facts in this case. The candidates nominated for representatives to the present general court, in the district, were Charles Fisher and William P. Macomber, both of Westport. When the clerks of the towns met, agreeably to law, after the election, to compare returns, and issue the certificate of election, the vote for representatives was found to stand as follows: —

Whole number of votes, ...	560
William P. Macomber of Westport, had . .	163
William P. Macomber had	145
Charles Fisher of Westport, had	252

The clerks declined to count the votes which were cast for William P. Macomber (without the name of the town annexed) for William P. Macomber of Westport, and consequently Charles Fisher was given the certificate, as having received a plurality of votes cast.

The petitioner claimed that the votes for William P. Macomber, where the name of the town was omitted, were intended for him, and should have been so counted. If the votes so thrown had been counted for him, he would have received 308 votes, or 56 votes more than the sitting member. This, then, was the question which the committee were called upon to determine. The contestant was represented by counsel, and produced a cloud of witnesses to substantiate his claim.

The contestant testified that he was, and for his whole life had been, a resident of Westport; that he was asked, prior to the convention, if he would accept the nomination of the prohibitory convention; that subsequent to the meeting of the convention, he had been waited on by a committee, who informed him of his nomination, and asked his acceptance, which was given. He knew that both parties acted upon an agreement or understanding that the candidate for this year was to be a Westport man. He did not learn that there was any question about his being the candidate till after election, when it was discovered that

there were ballots without the name of the town attached, and that there was a man in Dartmouth of the same name. He also said that Charles Fisher, the sitting member, called upon him, after the convention, and had some conversation with him, in regard to one or the other withdrawing from the contest.

Albert F. King of Westport testified that he was a member of the convention of the prohibitory party for the district, and was one of a committee to notify William P. Macomber of his nomination. He saw Macomber before the convention, and he agreed to be a candidate. He did not then know that there was another William P. Macomber in the district. He was one of the ballot committee, and ordered the name of William P. Macomber of Westport to be printed.

William P. Macomber of Dartmouth testified that "he was not consulted by anybody about being a candidate; was not a candidate; had lived in Dartmouth nine years; voted at the last election for William P. Macomber of Westport; did not know whether the name of the town was printed after the name of the candidate or not."

William Barker, Jr., of Dartmouth, was called by the contestant. Mr. Barker had resided in Dartmouth fifty-seven years. He appears not only to have been the leading manager of his party, in the last election, but has also been appreciated as a public officer, as he seems to have held all the important town and State offices in the gift of Dartmouth for a long number of years. He was, as a spectator, in the convention that nominated the petitioner. He testified that the general understanding was, that the representative for the present year was to be a resident of Westport; and that an arrangement to that effect was made last year. He voted for William P. Macomber of Westport. In response to inquiries by the sitting member, Mr. Barker said, that the polls were closed, or "the boxes were turned," in Dartmouth, at twelve, M., upon his motion. He further stated, that there was a factory in that town, but he did not know how many of the employees were voters in that town. This fact is not significant in itself, but is, when it appeared, from the statement of the sitting member, that the employees of the large factory were in the habit of exercising the *freeman's right* of ballot during the noon hour. Mr. Barker, nor any one else, appeared to remember when a like early closing of the polls took place in that town. The sitting member did not question the legality of the early closing, but simply called the attention of the committee to what he considered a sharp trick by his opponents. At this point the committee were impressed with a

slight suspicion that the arts of the local politician were not whol to be found in the cities, nor in any one political party. Perha the committee may be allowed to express the opinion, that noo is an early hour for closing the polls, in a town where there a many laboring men; that is to say, mechanics or employees i factories. It is, however, only just to say, in behalf of the co testant, that if his party friends in Dartmouth had an idea th the factory operatives would not vote their ticket, and so pr vented them from voting at all, he knew nothing of the matter.

There was a mass of uncontradicted testimony offered, to sho that William P. Macomber of Westport was the man for whom th voters of the district intended to vote. As the sitting membe raised no question as to the intention of the voters to cast thei ballots for William P. Macomber of *Westport*, and as the testimon was cumulative, the committee did not hear all the gentlemen wh were present, and forbear to quote further from the statements c those who were heard.

After the hearing, there existed in the minds of the committe no reasonable doubt, that the votes cast for William P. Macombe were intended for William P. Macomber of Westport.

Cushing, in his "Law and Practice of Legislative Assemblies" (Part I, chap. iv, p. 42), states the rule to be followed in suc cases, as follows: "Where there are several persons of the sam name in a constituency, all of whom are in fact equally eligible and one of whom has been designated as a candidate, ballots bea ing that name are, by a reasonable intendment, and without an further designation, supposed to be given for that candidate."

Equity requires that the will of the voters should be respected where it can be ascertained without violation of the forms of law.

The committee are, therefore, unanimous in the opinion that th petitioner is entitled to the seat, and they recommend the adoptio of the accompanying resolution.

[The resolution declared the petitioner entitled to the seat an was adopted. H. J., 1878, p.117. Mr. Macomber qualified, an took the seat. *Ib.*, p. 184.]

D. SMITH KIMBALL *v.* JOHN W. TILTON.

House Document, No. 92. February 25, 1878. Report by NATHAN M. HAWKES, *Chairman.*

Recount of Votes granted. Where, at the election of representative, in a district composed of the city of Haverhill and town of Methuen, the petitioner was elected, according to the original count, but the votes of Haverhill were afterwards, upon petition, recounted by the aldermen, and by the recount the sitting member was returned as elected, by a plurality of three votes, in the district, the votes of the district were recounted by vote of a majority of the committee.

Dissenting Views of the Chairman on Question of Recount. The chairman of the committee submitted his views, as a minority, that a recount of the votes in part of a district, by the proper authority, in the absence of evidence tending to throw suspicion upon the returns of the other portion of the district, affords no reasonable ground for the house of representatives to recount the votes of the balance of the district.

The Committee on Elections, to whom was referred the petition of D. Smith Kimball, asking for a recount of the votes for representative in the nineteenth Essex district, being the district now represented by John W. Tilton of Haverhill, having considered the same, submit the following report: The nineteenth Essex district comprises the city of Haverhill and the town of Methuen, and sends three representatives to the house.

The petitioner represented that he was a candidate for a seat in this house at the November election in 1877.

He asked for a recount of votes, in said district, upon the ground that, "upon the first canvass of votes, cast at said election, it appeared that he was elected by a plurality of 43 votes over John W. Tilton, the opposing candidate, but upon a recount of the vote of the city of Haverhill, upon the petition of said Tilton, the result of the first count appeared to be so far changed, as that, taking the vote of Methuen as declared, with that of Haverhill as recounted, said Tilton was elected by a plurality of three votes." And "believing that he was rightfully elected, and that he was wronged by the partial recount in said district, and that a full recount of all the votes cast at said election of representatives throughout said district, would show that he, and not said Tilton, received the larger number of votes for said office, he prays that, under the authority of your body, a recount of the vote of said town of Methuen, or of the whole district, be had by your committee on elections."

A hearing was granted upon the petition, wherein the facts relating to the election, as above set forth, were stated by the petitioner, and admitted by the sitting member.

The committee asked leave of the house to send for persons and papers.

The order allowing the same was adopted.

The ballots of the whole district were produced by the officers having charge.

The votes were counted by the committee, who are unanimous in the result of the count, which is, that there is no error in the original count of the votes cast in the town of Methuen; and in the city of Haverhill the sitting member and the contestant each has one more vote than was counted for him by the board of aldermen.

It thus appears that Mr. Tilton, the sitting member, was elected by a plurality of four votes.

The committee, therefore, recommend that the petitioner have leave to withdraw.

Mr. HAWKES, the *chairman*, submitted the following views, regarding the recount of votes by the majority of the committee:

The undersigned, a member of the Committee on Elections, believes that the recounting of ballots, in the above case, was uncalled for by the usages and precedents of this and similar legislative bodies.

This house itself has decided, in the case of *O'Connor* v. *Locke*, *ante*, p. 310, that a recount should not be ordered, without some fraud or error, or other good cause, was alleged, which would tend to throw suspicion upon the returns of the city or town officers charged with the duty of ascertaining the result of elections.

That case differs from the present, only in the formation of the district. In the matter of *O'Connor* v. *Locke*, the district was a single ward of a city, where a recount had been made by the board of aldermen. In this case the district comprised a city and a town.

A recount had been made in the city; but no recount had taken place in the town, by reason of the provisions of law, applicable to towns, differing from those of cities: that is to say, the returns of town officers once made, there is no authority to recount, except as in the case of representatives, by an order of the house.

In cities, it is the duty of the mayor and aldermen to recount, upon petition, in compliance with the statutes.

The reason for the distinction is patent; for in cities the counters are ward officers, and the mayor and aldermen are an independent and superior power; while in towns, the whole machinery of election is in the hands of one body, — the selectmen.

In towns the vote is, as a rule, much less than in cities. It is the custom of many, if not most towns, like Methuen in the present

case, to vote for representatives upon separate ballots, deposited in separate ballot-boxes. This lessens the liability for a miscount. It is somewhat of a difficult problem to solve, to create a revising board, without rendering our election system unreasonably cumbrous.

The present case demonstrates the accuracy of town officers, and presents a very agreeable contrast to the experience of those who have been called upon to compare the returns of cities. The returns of the selectmen of Methuen agreed exactly with the official recount by your committee.

The returns of the ward officers of the city of Haverhill, with the vote of Methuen, would have elected Mr. Kimball.

Upon a recount of the votes of Haverhill by the board of mayor and aldermen, had upon petition of Mr. Tilton's friends, the result was reversed, and Mr. Tilton was given the certificate of election.

Mr. Kimball claimed, that, as he lost the seat by a partial recount of the district, it was only fair to allow him a recount of the vote of Methuen, as of the whole district.

At the hearing before the committee, he neither proved, nor offered to prove, any illegality, informality, fraud, error, or mistake in the election proceedings, in the count or return of the vote of the town of Methuen.

Both parties expressed themselves content with the fairness and correctness of the figures of the mayor and aldermen of Haverhill.

Granting a recount, under the above circumstances, seems to the undersigned a good-natured yielding to the natural desire for one more chance at fortune's wheel.

Armed with the power of sending for persons and papers, by an order of the house, the committee sent for and counted the ballots of not only Methuen, but also Haverhill.

It is true, the contest between these two gentlemen was very close; but the house of representatives of Massachusetts has, on various occasions, and notably in the able and logical report of last year's committee, in the case of *McGibbons* v. *Walden*, *ante*, p. 289, for a recount of the votes for representative in the eleventh Essex district, decided that closeness of the vote constituted no ground for a recount by the house. Errors may exist in every representative district in the Commonwealth.

Will the house of representatives, upon the petitions of two hundred and forty good citizens, who may have been voted for, order or permit its committee on elections to count all the ballots cast at the annual election, without the shadow of a reason being given? If so, something of a burden is put upon the committee,

and the whole time of an average session of the general cou might be wasted, in settling claims for the seats of members.

Had the result of the recount been different in this case, had illustrated the fact that the contestant had been kept from his se by the partial recount, the undersigned might not have felt call upon to make this protest against what he considered a dangerou loose, and vexatious meddling with the certificates and seats members of this house.

Reluctant to differ with his committee, the undersigned is y strongly of the opinion, that a partial recount, — that is, a recou of a portion of a district, by the properly constituted tribunal, the absence of any allegation tending, in the slightest, to thro suspicion upon the returns of the other portion of the district, - affords no reasonable ground for this house to permit the re-coun ing of the balance of the district.

[The report of the committee was accepted. H. J., 1878, p. 21 The action of the majority of the committee, in recounting the vot is regarded by the editors as a bad precedent, and, under the pr visions of the resolve giving to the editors a discretion in suc cases, would not have been reported, except for the able an vigorous statement of dissenting views by the chairman of th committee. These views are referred to in subsequent cases, a the true exposition of the law, and for that reason are reported.]

HOUSE—COMMITTEE ON ELECTIONS, 1879.

Messrs. JOHN H. SHERBURNE of Boston, *Chairman;* EDWARD J. JENKINS of Boston, SAMUEL R. DAMON of Lancaster, RUFUS SMITH of Chatham, ELIJAH B. DANIELS of East Medway, WILLIAM LYON of Lynn and DANIEL S. MOONEY of Marlborough.

JOHN D. MULCHINOCK *v.* EDWARD J. JENKINS.

House Document, No. 20. January 16, 1879. Report by JOHN H. SHERBURNE, *Chairman.*

Recount of Votes refused. Votes for representative will not be recounted by the House of representatives merely because the petitioner believes there may have been error in the original count.

The Committee on Elections, to whom was referred the petition of John D. Mulchinock, contestant for the seat now occupied by Edward J. Jenkins from the twelfth Suffolk district, asking that the votes of said district be recounted, have duly considered the same, and report as follows:

The petitioner requests a recount on the following grounds: — "That he has reason to believe that more votes were cast for himself than for Edward J. Jenkins;" "that the counting upon which said Jenkins was declared to be elected was erroneous;" "that errors of count exist in each precinct;" "that he believes more votes were cast for himself than were counted or declared."

In answer to a question by the committee, the petitioner stated that he had applied properly to the board of aldermen for a recount of the votes within the time specified by law; but that, for some technical reason, the aldermen had refused to grant his request.

The petitioner offered evidence tending to show, that at the election for representatives in said district, held on the 5th day of November last, the vote was declared to be as follows:

Patrick F. Murphy, ...	1,162 votes.
Edward J. Jenkins, ...	946 "
John D. Mulchinock, ...	854 "
Francis Hayden, ...	398 "
Scattering, ...	A few "

The petitioner offered no evidence to sustain any of the allegations contained in his petition; disclaims fraud of any kind; and

seeks to control the plurality of ninety-two votes, which the seated member, Jenkins, has over himself, by simply saying that "he thinks there may have been some error in counting the votes."

The committee therefore recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1879, p. 66.]

Ira P. Pope et al. *v.* J. Albert Blake.

House Document, No. 21. January 17, 1879. Report by John H. Sherburne, *Chairman.*

[In this case the votes for representatives were recounted, without a statement of the grounds for the recount. Upon the recount the sitting member was found to have been elected by such a plurality as to render immaterial the question whether certain disputed votes should be counted, and the committee thereupon reported that the petitioners have leave to withdraw, and the report of the committee was accepted by the house. H. J., 1879, p. 73. The case, in the opinion of the editors, is not of value as a precedent.]

Horace L. Bowker *v.* George H. Bond.

House Document, No. 29. January 21, 1879. Report by Messrs. Sherburne, Damon, Smith and Daniels, — Messrs. Jenkins, Mooney and Lyon dissenting.

Recount of Votes granted. Where the petitioner was declared elected by the ward returns of a city, and the votes were afterwards, upon petition, recounted by the aldermen of the city, and the sitting member found by the recount to have a plurality of three votes, the house, against the report of a majority of the committee, ordered the votes recounted; the minority of the committee reporting in favor of a recount, on the ground that the original count by the ward officers was carefully made; that

In the recount by the aldermen there was reason to suppose that certain votes for "Dr. Bowker" and "H. L. Bowker" were not returned by them as so cast, but, if returned at all, were classified with fourteen votes returned as cast for "all others"; that other persons assisted the aldermen in making the recount; and that there was a dispute as to how many votes were upon the recount returned as cast for "all others."

NAPOLEON B. BRYANT *for petitioner.*
ALBERT E. PILLSBURY *for sitting member.*

The Committee on Elections, to whom was referred the petition of Horace L. Bowker for the seat as representative for the fourteenth Suffolk district now held by George H. Bond, and asking that the votes of the said district be recounted, have duly considered the same, and report as follows: The fourteenth Suffolk district comprises ward 14 of the city of Boston, and is entitled to two representatives. The grounds relied upon in the petition, are as follows: That, at the state election held upon the 5th day of November last the petitioner was a candidate for the legislature in said district, and did receive at that election a plurality of the legal votes cast at said election, as shown by the sworn returns of the election officers of said district, duly certified and returned, and was therefore legally elected; that the ballots were subsequently recounted by a committee of the board of aldermen of the city of Boston, who, without warrant of law, did reject certain ballots cast for petitioner, owing to some technical error in writing or spelling petitioner's name upon said ballots; and did otherwise change the result of the sworn returns of the election officers; and did thereby cause the certificate of election to be given to George H. Bond, the sitting member, without having received a plurality of the votes, as required by law; that great injustice has been done him and the voters of his district by the action of the board of aldermen; and that George H. Bond did not receive a plurality of the votes cast upon the day of election, and therefore is not entitled to a seat; and petitioner prays that said seat, of which he believes himself now unjustly deprived, may be granted to him.

At the hearing before the committee, the counsel for the petitioner was allowed to put in as evidence a paper, duly certified by the city clerk of Boston, to be a copy of the return from ward 14, of the results of the election for representatives, as shown by the original returns of the ward officers, and by the recount of the board of aldermen. By this paper it appeared that by the original return the sitting member received in

Ward 14, ...	1,133 votes.
And the petitioner, ...	1,142 "
While "all others" had	12 "

By the recount it appears that the

Sitting member had	1,141 votes.
The petitioner	1,138 "
" All others "	14 "

The counsel for petitioner then called the following witness who, having been sworn, testified substantially as follows: —

Alvah H. Peters, Messenger of City Council. Cannot s whether all the committee for recounting votes were present this recount or not, as it was made with other recounts, and don't remember occasion. I don't remember how long it to to recount. Mr. McCleary, city clerk, and Mr. Priest, assista city clerk, and myself, assisted. I was in and out, and h nothing to do with counting. The committee counted, and can't tell how it was summed up. The counting took place fourth floor of City Hall, and the room has four windows in If I remember this case, the counting took place between 4 P. and 9 P.M.; but I don't know whether it was continuous or nc I think Mr. Priest was keeping tally.

Cross-examined. No one had anything to do with the cour ing but members of the committee, and I don't know from n personal knowledge what Mr. Priest was doing. Don't rememb who of the committee were there; but Alderman Viles was the all the time.

John T. Priest. Have been assistant city clerk for five yea I was present all through the recounting of ballots by committe and had some six days' and six nights' work: so my memory somewhat blurred. I kept record of precincts, and Mr. McClea consolidated the figures for the report. The figures were ma by the committee, and when they finished precincts they gave t the figures. On this recount all of the committee were presen and two would take a box and count, and some two of the othe would verify count. I didn't examine ballots particularly, b saw some pasted, and perhaps one pinned. I don't know pa ticularly about the ballots for " all others." Sometimes ballc are thrown in the wrong ward, and then they are set out; b if a ballot contains the name, say, of John Smith, or any o else who is not a candidate, it is not generally noted separatel as it does not alter return (witness shown paper set forth abov I have no personal knowledge of " all others 14." Suppose added those figures up; and I think no one was in the comm tee's room excepting Mr. McCleary, myself, and messenger, d ing the counting.

Samuel F. McCleary. I am city clerk; these votes were counted November 7, upon request for a recount. Each wa

has a box which is put in my charge till called for. When the recount took place, the boxes were opened, and two of the committee took charge of a precinct. One of them would count the votes; and then the other would recount, and verify the first count. I took down the results of the counts, and have them in my own handwriting; only the committee counted. I recorded results, and they correspond with the return. (The original of paper set forth above was shown to witness.) I recognize that as the only return, and there is no other paper like it. It is taken from a book containing ward returns, and from precinct list. In my precinct I often aggregate by saying all others. Our practice is to record the names of candidates, and not to mind small fellows of a vote or two. Every vote cast for Bowker, Bond, Farrell, and Noyes, I undertake to say is counted and recorded. I know nothing personally about the correctness or incorrectness, but do know our custom. This was the first recount we had. The committee began at four o'clock, and finished it in two hours; then sealed up votes, and took another ward.

Mr. Hutchinson. Salesman for Suffolk Brewing Company. Was clerk of precinct, and Marcus Morton was warden. Counted the votes, and the warden helped. Counted straight and crooked ballots, and gave every man his right number. I did not verify count, and did not count all the ballots but once. Counted some portion of them over, and it agreed with warden's count; and, if it didn't, we made it. Inside of an hour all ballots were counted. After polls closed, turned in my returns. Supervisor counted, and compared with check-list; and it varied but one or two. Supervisor counted all ballots that were deposited, but can't say whether he counted votes for representatives. I think I counted correctly.

Mr. Cherrington. Inspector precinct 3, ward 14. Think I saw one or two votes for "Dr. Bowker" in pencil; but I won't swear to it. My impression is that "Dr. Bowker" was written over erased name; but can't tell whether it was over a representative's name.

Edward F. O'Brien. Clerk in the employ of the John Simmons estate, was clerk of precinct 3, ward 14. Inspector took the ballots out, and I counted them. My tally sheet corresponded with count. I didn't go over ballots but once. Saw every ballot; but don't remember any ballot with "Dr. Bowker" on it.

William A. Guild. Supervisor precinct 5, ward 14. I saw no ballots for "Dr. Bowker." Saw one ballot with pin in it.

Mr. McLaughlin. Supervisor. Saw ballot with a pin in it. One lot contained 123 clean representative ballots; that is, there were

111 ballots clean, and 12 scratched for representatives. I think I saw "Dr. Bowker" over senatorial name; and, in 133 ballots one showed the name of "Dr. Bowker." Don't know whether "Dr. Bowker's" vote was counted or not. The name "Dr Bowker" was placed over name of candidate for senator from fifth Suffolk district.

Henry S. Treadwell. Supervisor precinct 5. Remember several ballots torn apart, and pinned together. The warden pinned first ballot together which had cut two-thirds down by printing press, but above representative vote, I think.

Albert F. Lauten. State liquor agent of New Hampshire. found Mr. Bowker at City Hall; and he showed me a paper he had purporting to be signed by Clinton Viles. Examined it; and it seemed to credit principal candidates, and then said, "All others 48." Just below, the candidates again appeared to have been credited with their votes; and the words "all others" again appeared; but the number was changed to 35.

Upon the foregoing evidence, the counsel for the petitioner claims to have shown a strong probability that the results arrived at by the ward officers were correct, and consequently the count by the aldermen incorrect. But the majority of the committee upon a careful inspection of the evidence, are led to a different conclusion; for it will be seen, that although the ward officers may have been very competent men, and performed their duty very faithfully, yet the fact remains by their own evidence, they counted the ballots but once; while the testimony of McCleary and Priest is to the effect that the votes of every precinct of that ward were counted first by one of the committee of the board of aldermen, and then recounted, and the results verified by another member of the committee.

Again: the petitioner claims that he is entitled to a recount on the ground of the illegality of the record, wherein is set forth the words and figures, "all others, 14."

Upon this point it may be well to inquire what the true record or return is; and the law upon this question is found in the Act of 1876, chap. 188, sect. 4; Pub. Stats., chap. 7, sects. 36, 37, and 38, and is as follows: "If, within three days next following the day of any election, two or more qualified voters of any ward shall file with the city clerk a statement in writing, that they have reason to believe that the returns of the ward officers are erroneous, specifying wherein they deem them in error, said city clerk shall forthwith transmit such statement to the board of aldermen or the committee thereof appointed to examine the returns of said election. The board of aldermen, or their committee, shall

thereupon, and within five days, Sunday excepted, next following the day of election, open the envelope and examine the ballots thrown in said ward, and determine the questions raised; they shall then again seal the envelope either with the seal of the city or a seal provided for the purpose, and shall indorse upon said envelope a certificate that the same has been opened, and again sealed by them in conformity to law; and the envelope, sealed as aforesaid, shall be returned to the city clerk. Said city clerk, upon the certificate of the board of aldermen, or of their committee, shall alter and amend such of the ward returns as have been proved to be erroneous, and such amended returns shall stand as the true returns of the ward."

Under the foregoing section, it would seem that the only true return before this committee is the one made by the board of aldermen; and it does not appear that they are restricted to any set form in making such return; on the contrary, their only function seems to be "to determine the questions raised," and "alter and amend such of the ward returns as have been proved to be erroneous;" and upon this point there has been no evidence produced tending to show that the aldermen have not properly done their duty, or have been guilty of any carelessness, negligence, or fraud.

Upon reviewing the precedents and authorities upon questions of this kind, the rule seems to have been firmly established and followed, that the sitting member holding a certificate of election has a *prima facie* case; and his title is not to be put in peril, unless some good reason is given. *Davis v. Murphy*, *ante*, p. 177; *French v. Bacon*, *ante*, p. 184; *Scribner v. Keyes*, *ante*, p. 296; *Taylor v. Carney*, *ante*, p. 228; *O'Connor v. Locke*, *ante*, p. 310.

The majority of the committee, therefore, find that the petitioner has not shown that the committee of the board of aldermen were guilty of any carelessness, irregularity, or fraud, or any conduct that would invalidate their return, or deprive their official acts of the credit to which they would otherwise be entitled; and they therefore recommend that the petitioner have leave to withdraw.

A minority of the committee, Messrs. JENKINS, MOONEY and LYON, submitted the following views: —

The undersigned, a minority of the Committee on Elections, beg leave to regret their inability to agree with the majority, and do submit the following: —

In order that a proper understanding of the case may be had, it may be necessary to state that the legislature at its last session passed a law dividing the different wards of the city of Boston into

polling-places of about five hundred voters each. Under the pr visions of that act, in the first instance, the mayor appointed, fro the great political parties, the precinct officers, consisting of a wa den clerk and two inspectors for each precinct. In addition the above-named officers, there were two United States supervise of elections, appointed by one of the justices of the United Stat circuit court, who also counted the ballots. By this arrangemer it appeared that six men were required to receive, sort and cou the ballots in each precinct. The time allowed for this work w not less than eight hours, or during the time the polls were ke open, and as much time subsequently as the ward officers might r quire. This, in connection with the fact of the limited number ballots to be counted, — five hundred, or less, — would seem justify the assertion that every means possible had been taken secure a just and fair election, with ample opportunity for maki correct and proper returns.

In the case now in hearing, it appeared that in the fourteenth Su folk representative district (fourteenth ward of the city of Boston upon the day of election, Nov. 5, 1878, Horace L. Bowker obtain a plurality of nine votes for representative to the general court, shown by the returns of the ward officers, in the five precinc which comprise the district, over George H. Bond, who now hol a seat in this house. By a subsequent recount of the votes of sa district by a committee of the board of aldermen of the city Boston, the certificate of election was given to the sitting memb by a plurality of three votes; thereby making a difference twelve votes, as compared with the ward officers' returns.

The petitioner claimed, and it was not contradicted, that t ward officers appointed by the mayor were most excellent and cor petent men, and discharged their duties in a faithful and imparti manner; no evidence being introduced tending to show that the was any illegal or improper conduct on the part of the precin officers in counting the ballots or making their returns. The cler in two of the polling-places where the greatest errors appear to exi by the aldermanic recount, testified before your committee, that, their opinion, no such errors were probable or possible. The cle in the third precinct, where the aldermen claim to find eig errors in a total vote of four hundred and fifty-eight, on oa testified that he kept a tally-sheet, which he afterwards verifie and found to agree exactly with the returns made. In the fir precinct, the aldermen claim that thirteen errors existed in total vote of four hundred and sixty-two. The petitioner offer to prove, if sufficient opportunity was given, that the most ca ful count was made in this precinct, and in all other precinc

but a majority of your committee ruled that evidence tending to show the accuracy of the ward officers' count and returns was immaterial, and decided to hear no further testimony on this point.

The minority of your committee believe that evidence tending to show the accuracy or the manner in which the ward officers made their returns, is of vital importance in this case. From the evidence before your committee, it appears that the ward officers in the several precincts, five in all, made up their returns separately, and sent the same to the city clerk, as the law directs; and it further appears, from the aldermanic recount, that no clerical errors were found in any of the said precinct returns. The mistakes most likely to occur in such cases are errors in addition, overlooking a package of ballots, or placing a tally in the wrong column. The fact that the ward or precinct officers, twenty in all, made five detailed reports with no clerical errors forms of itself strong presumptive evidence that their work was done in a thorough and satisfactory manner.

We think that where no fraud is alleged, or clerical errors found, the strongest reasons should be shown in all cases for setting aside the returns of the sworn ward officers, who are surrounded with proper safeguards, and substituting therefor the returns of a limited tribunal with no safeguard whatever, who may or may not discharge their duties in a proper manner, leaving no means of redress except the will or favor of the final tribunal to which an appeal must be made. In this case we have the detailed count and returns of twenty men as against five men. In the former count no clerical errors are found; in the latter we have no means of knowing. Whether the board of aldermen did or did not make errors can only be determined by examining their returns. This the committee have an undoubted right to do; and we believe, in justice to the people of that district and all parties concerned, it should be done. The difference between the recount of the committee of the board of aldermen, and the returns of the ward officers, since no clerical errors appear in the ward returns, must, we think, of necessity arise from some error in the aldermanic recount, or a difference in sorting the ballots. The petitioner claims that certain ballots were cast for him which did not bear his full Christian name upon them, — such as "Dr. Bowker," the name he is commonly called by; and others with his initials, "H. L. Bowker," instead of the full name, "Horace L. Bowker." One of the inspectors swore that there were several ballots cast in his precinct with simply the name of "Dr. Bowker" written in pencil upon them, as alleged by the contestant. The petitioner offered to produce other witnesses, ward officers, etc., who would testify that

ballots with simply the title "Dr. Bowker" were thrown in othe precincts. If such be the fact, the rejection of such ballots by th board of aldermen might account for the difference in their return from that of the ward officers. If the aldermen discharged thei duties in a legal and proper manner, they certainly would nc count ballots cast for "Dr. Bowker" as Horace L. Bowker, bu would return them under a separate head. The policy of the legis lature has been in all such cases to allow the *intent* of the voter t be recognized, when the party voted for has been clearly identifie by the ballot thrown. The initials, spelling of the name, etc., ha never been considered of as much importance as the intent of th voter. In proof of this, we cite several cases where persons hav been unseated or otherwise, in our house of representatives, wh held their certificates of election through some technical error i the ballots cast for their opponent. *Shaw* v. *Buckminster*, *ante* p. 221; *Hood* v. *Potter*, *ante*, p. 217; *James Pratt*, *Jr.*, Mass Contested Election Cases, Cushing, S. & J. 236; *Coggswell* v *McNeil*, *ante*, p. 108; *Chapin*, *Jr.* v. *Snow*, *ante*, p. 96; *Wright* v *Hooper*, *ante*, p. 100; *Arnold* v. *Champney*, *ante*, p. 121; *Hobb* v. *Bartholmesz*, *ante*, p. 182. We also refer to the case which ha come before your committee the present session, *Pope* v. *Blake* *ante*, p. 320. In this case the request of the petitioner to have th ballots recounted was granted without the production of any evi dence whatever, except the *ex parte* statement of the petitioner' counsel, and against the remonstrance of the counsel of the sittin member, who was not allowed a hearing, much less an opportunit to present his arguments in the case. In the case now in hearing the strongest evidence is demanded why a recount of the ballot should be had, and, as a minority of your committee believe, a unreasonable demand is made upon the petitioner, — i.e., to prov the inaccuracy of the aldermanic recount, — while at the same tim the committee refuse to hear testimony to substantiate the correct ness of the original returns of the ward officers, or even to impeac the accuracy of the amended return, as reported by the board o aldermen, and, still further, refuse to recount the votes which wer presented to the committee; which latter action would settle th dispute beyond all cavil.

The method of recounting the ballots by a committee of th board of aldermen in this case, if strictly legal, could not be satis factory, for want of a proper record, if for no other reason. Th law requires that the selectmen or ward officers shall make a retur of all the names voted for, and declare the same in "open tow meeting," etc. If boards of aldermen in making recounts do no come under the provision of this law, it furnishes the stronges

reason for a subsequent examination of their returns in all closely contested elections. In this case it will be seen that they have made returns in a very imperfect manner, by recording scattering votes for various persons from one to twenty-one, and then classifying fourteen votes under the head of "all others." Why are not the names of the fourteen others given, when, in some instances, one, two and three votes are properly recorded? If this vote is to be considered a legal and proper one, upon the same principle might have been classified under the head of "all others" every vote thrown, except for the successful candidates; and, as the record stands in this case, the aldermen have designated under the head of "all others" a sufficient number of votes to change the result of the election many times over. Now if, as the petitioner alleges, votes were thrown, with his name or initials not correctly borne upon the ballots, they must be found under the head of "all others;" and if the sworn returns of election officers are to be set aside, and imperfect ones substituted, it is, as we believe, the imperative duty of the legislature to make a proper investigation in all such cases; because, if such returns are accepted as final, it is possible for boards of aldermen in future to take advantage of such precedents, and to classify a sufficient number of votes under the head of "all others" for the purpose of electing a favorite candidate, and defeating the will of the people.

The law requires that the board of aldermen, or a committee thereof, shall make a recount of ballots on petition of ten legal voters, etc.* No other persons are mentioned or implied in this act; but in this case it appears, from the testimony of two witnesses, that the assistant city clerk did do a certain part of the work by sorting and counting the ballots; he also kept the tallies, and rendered other assistance. It may be legal for the aldermen to call in any one who is at hand to assist them in sorting and counting votes, and in making returns; but, if so, the practice is attended with great danger; and when certificates of election are given upon such returns, which set aside the records of sworn ward officers, declared in "open town meeting," as the law directs, it ill becomes the legislature, we think, to refuse the most full and searching investigation.

The city clerk testified that he was present during this recount, but that he took no part in sorting and counting the ballots; consequently that he had no knowledge of what votes were counted or rejected for the petitioner. Councilman Albert F. Lauten, another witness, testified that he, in company with the petitioner, examined

* Pub. Stats., chap. 7, sects. 36–38.

what purported to be a copy of the aldermen's recount, and swore in the most positive manner to the signature of the chairman of that committee. He further testified, that, in the report so signed, thirty-five votes were recorded for "all others" instead of fourteen, as shown in the certified returns of the city clerk annexed. Further testimony was offered to show that the returns exhibited at City Hall did not agree with the certified returns, but was ruled out by the committee. The counsel for the sitting member presented another paper, which he claimed was a copy of the aldermen's recount, and differing from the certified copy annexed; but, as this paper was not received by your committee, it became no part of the evidence in this case. What further light upon this subject might have been produced, had the petitioner been allowed to produce other evidence, cannot be determined; but, if the evidence already produced is to be relied upon, the records at City Hall must have undergone some changes after the votes had been counted, and the certificate given to the sitting member. Great stress has been laid upon the fact that towns should have a recount of votes by the legislature, while cities should rely upon the recount of the board of aldermen; but we can see no good reason for this argument, when the legislature has the exclusive right to judge of the qualifications of its members. In our opinion, the legislature should in no instance, when a reasonable doubt exists regarding the accuracy of election returns, surrender its great *constitutional right* to a board of aldermen, or any committee thereof. The law does not contemplate the recount of votes by a board of aldermen to be final; for it requires that ballots, check-lists, etc., be carefully sealed and preserved, that they may again be recounted and examined by the legislature, if so desired. We would by no means wish to establish the precedent by which any party who might fail of an election could come here and claim a recount of votes, with the hope of receiving benefit therefrom; neither would we establish the precedent that any party who obtains a certificate of election through an intermediate tribunal by reason of technicalities, in opposition to the will of the people, can retain his seat without question and proper investigation.

With such evidence as we have before us, we are forced to believe, in view of such discrepancies as appear to exist in this case, that great injustice will be done the petitioner and the people of his district, if so reasonable a request as recounting the ballots is refused. The legislature has, in repeated instances, gone back of the returns, and asserted its just right to receive or reject them; and in this connection we must respectfully call your attention to the case of *Shaw* v. *Buckminster*, *ante*, p. 221; the case of *Davis*

v. *Murphy*, *ante*, p. 177; to the case of *Haskell* v. *Closson*, *ante*, p. 233; in which the committee on elections refused to recount the ballots, and were ordered to do so by vote of the house.

Other cases might be cited, if deemed necessary; and in view of all the facts in the case, or bearing upon it, we think that sufficient evidence has been produced to warrant the belief that the original returns made by the ward officers are more reliable than the subsequent returns of the board of aldermen.

That no injustice may be done, that the rights of all may be respected, that the laws may be maintained, and that the will of the people may be obeyed, we most respectfully recommend the passage of the following resolution: —

[The resolution ordered the committee to recount the votes for the representatives in the district. The house ordered the report to be recommitted with instructions to recount the votes. H. J., 1879, p. 95 The committee thereupon made such recount, and reported in House Document, No. 59, Jan. 31, 1879, that by the recount the sitting member had exactly the plurality found by the committee of the board of aldermen. The committee reported that the petitioner have leave to withdraw. The report of the committee was accepted. H. J., 1879, p. 167.]

George E. Filkins *v.* Timothy B. Spillane.

House Document, No. 66. February 3, 1879. Report by John H. Sherburne, *Chairman*.

Eligibility. Citizenship. Certificate of Naturalization conclusive. Where the representative returned, depended for eligibility as a citizen, upon the naturalization of his father, during his own minority, it was *held* that the certificate of naturalization issued to the father was conclusive upon the question whether his primary declaration was made in a court of competent jurisdiction.

The Committee on Elections, to whom was referred the petition of George E. Filkins for the seat as representative for the sixteenth Suffolk district, now occupied by Timothy B. Spillane, have duly considered the same, and report as follows: —

The sixteenth Suffolk district consists of ward 16 of the city of Boston.

The ground upon which the petitioner rests is, that Spillane, the sitting member, was not a naturalized citizen at the time of his election as representative, Nov. 5, 1878. The sitting member, Spillane, answers that his father, Patrick Spillane, became a duly naturalized citizen of the United States June 4, 1860; and, as he was a minor at that time, when he reached the age of twenty-one years he thereby became a citizen of the United States. The sitting member put in evidence a certified copy of the certificate of naturalization granted to his father, Patrick Spillane, by the circuit court of the United States for the district of Massachusetts, and dated June 4, 1860. The petitioner admits that the said certificate was duly and properly issued to said Spillane, but claims that the Newburyport police court, before which said Spillane made his primary declaration in 1854, was not a court of competent jurisdiction to receive the same, by reason of its not having a clerk, and thereby not being a court of record.

The case naturally resolves itself into two questions: —

First, Is it proper and right to go behind the certificate of naturalization granted by the circuit court of the United States?

Second, If yes, then was the Newburyport police court a proper tribunal to receive the primary declaration of Patrick Spillane at the time he made it?

Upon the first question the committee are unanimous in deciding that it is unnecessary to go farther than the judgment of the circuit court in the matter; and, in so doing, they follow the general current of decisions in this respect. Upon this point it was held by Chief Justice Marshall, in *Spratt* v. *Spratt*, 4 Peters, 407, and quoted in *Quirk* v. *McDonald*, *ante*, p. 229, that the various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. The judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close inquiry, and, like every other judgment, to be complete evidence of its own validity.

It is therefore unnecessary to consider the second question raised, as the case is finished by the disposition of the first; and the committee therefore recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1879, p. 167.]

In re Recount of Votes in Westfield.

Messrs. Andrew J. Jennings of Fall River, *Chairman;* Charles P. Aldrich of Deerfield, James W. Bennett of Lowell, Charles H. Litchman of Marblehead, and Andrew Bullock of New Bedford, *Special Committee.* Report by all the committee.

House Document, No. 232. March 7, 1879.

Unauthorized Recount of Votes. — Where, after the election, the ballots were placed in a bag, and delivered to the town clerk, who placed them in the town safe, to which several persons had keys, and the ballots remained there, more or less exposed to tampering, until February 13, when one of the selectmen, needing the voting-list, which had been illegally sealed up with the ballots, opened the bag and withdrew the list; and on the evening of that day, the town clerk, with the assistance of others invited by him, took the bag from the safe, which he found unlocked, tore it open, and recounted the votes for representatives, finding a large discrepancy between the result and that declared at the election, and then verifying his recount by another count, and neglected to destroy the ballots as required by law, — it was *held* that such recount was unauthorized and illegal, an outrage upon the rights of the returned member, and entitled to no weight; and the persons engaged in it were censured by resolution of the house.

The Committee appointed under the house order of February 26 last "to investigate and report to the house the facts in regard to the alleged unauthorized recount of ballots for representatives cast at the last election in Westfield, in the tenth Hampden district, and the alleged tampering with said ballots, and all matters relating thereto, with authority to sit at Westfield or Boston as they may deem proper, to send for persons and papers, and examine witnesses under oath," having fully heard and examined all available testimony and evidence relating to the subject-matter, submit the following report.

Seventeen witnesses, including most of the town officers, were examined under oath by the committee sitting at Westfield.

The committee find that at said election the ballots were successively counted by two counters, who handed the result of their count to the chairman of the selectmen. After said count had been duly announced, the ballots so counted were placed in a large paper envelope or bag. The opening of the bag was then closed by gluten, and subsequently the top turned down and firmly secured by three or four seals made by sealing-wax placed thereon.

At the time the ballots were placed in the bag, there were put into the bag several loose pasters, which had become detached from

their ballots in the process of counting. The number of such stickers is uncertain. Both counters thought there were not less than six; and one counter swore positively to two, which he remembered to have been put into the bag by himself. There were also a large number of ballots to which stickers were attached simply by pins. The bag, with a written indorsement thereon showing the nature of its contents, was then delivered by Lucius F. Thayer, the chairman of the selectmen, to the town clerk, Elmer W. Dickerman, with the remark, that "they belonged to him." At this time the bag was whole, and the seals unbroken. The bag was then placed in the town safe, in the selectmen's office, and, with such difficulty, as it appeared, that the bag was slightly torn or broken in the operation. The combination of this safe was or had been known to at least nine or ten persons, several of whom had at that time no right to enter the safe; although, at the time they learned the combination, they had such right. Several persons, officers of the town, had keys to the entrance-door of the office. There was no evidence that the safe was left open, except when the selectmen or proper officers were in the room or about the building, save in the instance given below. After the bag was placed in the safe, it was locked, and all parties left the office. One witness testified, that, after the bag was placed in the safe, the seals were unbroken, though some of them might have been cracked. On the following day the town clerk went to the office, took the bag out of the safe, and found two holes in the bag, which he pasted over with paper, secured by gluten. There was no evidence that the bag was again taken from the safe until the 13th day of February last, though it was frequently seen in the safe by persons who came into the office. About a week after the election, the town treasurer, having occasion to go to the safe, saw the bag, and observed that all the seals were completely broken, so that the top of the bag, which had been fastened down by them, stood upright; but the gluten fastening appeared to be all right, though he did not examine it.

On the afternoon of February 13 last, Selectman Thayer, needing the check-list which had been used at said election, and which had been illegally sealed up in the bag containing the ballots, went to the bag, cut a slit in the top, and drew the check-list from the bag. Mr. Dickerman, coming in soon after, and being informed what had been done, took the bag out of the safe, and patched up the hole with a paper secured by gluten; after which the bag was replaced in the safe. Mr. Dickerman then told Mr. Thayer that there was to be a recount of the ballots that night; asked if he could have the use of

the office, and if Mr. Thayer would be present. Mr. Thayer said he could have the office, and consented to be present. Mr. Dickerman subsequently notified Mr. F. S. Eggleston and Mr. W. H. Foote of the recount, and they also consented to be present.

Mr. Foote was the first to reach the office, which was open, and was soon followed by Mr. Dickerman, who at once proceeded to open the safe-door, which was closed. On attempting to unlock the safe, he found it already unlocked, and expressed great surprise, but opened the doors, took out the bag tore off its top, and placed the ballots on the table. The recount then began, the other two parties arriving during the recount. Mr. Thayer was obliged to leave after the vote for one candidate was ascertained, and took no further part in the matter. The remaining three finished the count, and, after making memoranda of the result, went to the town clerk's office to compare the figures with those of the official count. Finding a large discrepancy, they returned to the selectmen's office to verify their count by a second count. Since their departure the janitor of the building had been in the office, but testified that he had not touched the bag or ballots, which were then on the table or floor. Their second count was the same as the first. Neither of the parties saw or found any loose stickers in the bag, on the floor or table, or among the ballots, though special mention was made of the same, and a search made therefor. After the second count, Mr. Foote said to Mr. Dickerman. "Burn up those ballots: the whole thing ought to be burned up." As Mr. Dickerman did not seem disposed to do this, Mr. Foote took out a handful of the ballots and put them into the stove, where they were burned. The bag, with the rest of the ballots replaced in it, was left in a corner of the office, where it remained for some days. The parties then left the office, with the understanding that the whole matter was to be kept secret: which understanding was not carried out; for on February 15 the result of the recount was published, the figures being obtained from Mr. Dickerman, as the committee believe from the evidence given, although *he* swore positively that he had not, directly or indirectly, furnished such information.

The ballots were never destroyed by the town clerk, except as above stated; although, on the morning of February 14, his attention was particularly called to chap. 188 of Acts of 1876,* and he was told that the ballots must be destroyed; but on that day he made the following entry on the town record, p. 503: —

* Now Pub. Stats., chap. 7, sect. 34.

WESTFIELD, Feb 14, 1879.

The votes cast at the foregoing election — viz., Nov. 5, 1878 — have been destroyed.

Attest: E. W. DICKERMAN, *Town Clerk.*

Such were the principal facts established by the evidence before the committee. While there was no direct evidence of any tampering with the ballots themselves prior to the recount, the committee are not willing to say that they are fully satisfied that there was no such tampering. It was possible, and perhaps easy to so tamper with the ballots. Numerous persons had access to both office and safe; and the fact, that, not more than a week after the election, all the waxen seals were broken, and the additional fact, that, at the time of the recount, not a single loose ticket could be found, — unexplained as they were by the town clerk, who had charge of the bag, — were well calculated to excite suspicion.

It is but fair to say, however, that nearly every person who had the key to the selectmen's office, or knew the safe combination, was examined, and swore positively that he had never seen or touched the ballots previous to the recount, and had no reason to believe they had been tampered with. The instigator and mover of the recount was the town clerk, Elmer W. Dickerman, a political opponent of the sitting member, and the one who drew the petition which was presented to the house asking for a recount of said ballots. He failed to appear at the hearing assigned by the committee, or at any time thereafter, although opportunity was given to do so, and for reasons which were unsatisfactory to the committee. It was in evidence that he spoke of making a recount early in February, soon after the house committee on elections had reported leave to withdraw on the petition forwarded by him. He was then told that he had no right to recount the ballots, and was asked if the law did not require him to destroy them unexamined; and he replied that he believed so.

It appeared, that, when he invited some of the parties to be present at the recount, they asked him if he had a right to do it; and he replied that he had; that he had looked up the law, and that it did not apply in this case. His refusal to destroy the ballots after his attention had been specially called to that requirement of the law on February 14, and his entry in the town record on the same day that they had been destroyed, although nearly all of them were at that very time standing uninjured in the bag on the floor of the selectmen's office, need no comment. His evidence before the committee in regard to the whole matter was far from

satisfactory, being marked by equivocation, and at times by a forgetfulness strongly indicative of an attempt to conceal the truth, and once, as the committee believe, by absolute falsehood, in denying that he furnished the figures of the recount to the reporter who published them.

In view of all the facts in the case, the committee find that the said recount was unauthorized and illegal, and an outrage upon the rights of a member of this house; and that it is not entitled to any weight, legal or moral, as affecting his claim to have been duly elected. If any person, having been legally declared elected to any office, is to be liable to have his title to that office impugned at any time by similar proceedings of unauthorized persons, then we had better abolish at once all the legal safeguards heretofore provided. In consideration of the fact that the town clerk knew and claimed that there was no penalty named in chap. 188 of Acts of 1876, the committee suggest that it may be advisable to amend said chapter by providing a penalty; and, in conclusion, the committee recommend the passage of the following resolution: —

Resolved, That the house hereby censures all parties concerned, and more especially Elmer W. Dickerman, for their action in making an unauthorized and illegal recount of the votes cast for representatives in the town of Westfield, in the tenth Hampden district, at the last election.

[The report of the committee was accepted, and the resolution adopted. H. J., 1879, p. 385.]

HOUSE—COMMMITTEE ON ELECTIONS, 1880.

Messrs. JOHN M. COCHRAN of Southbridge, *Chairman;* MERRITT VAN DEUSEN of Westfield, ROBERT L. SPEAR of Somerville, CHARLES O. PARMENTER of Pelham, MARCUS M. LOUD of Abington, ERASTUS NICKERSON of Chatham, and WILLIAM H. GALE of Warwick.

BERIAH T. HILLMAN *v.* STEPHEN FLANDERS.

House Document, No. 46. February 3, 1880. Report by J. M. COCHRAN, *Chairman.*

Recount of Votes refused. The mere fact that a town clerk after making out his record of the votes, writing out the numbers and the figures after them, afterwards thought one figure was indistinct and erased it and wrote the figure again over the erasure, — is not such an error or change in the return as will justify a recount of the votes by the house of representatives.

Recount of Votes granted. Where the ballots in one town were sorted into four different bundles, and each bundle counted by a different person, no one person verifying the count, — the votes of that town will be recounted by the house of representatives.

Qualification of Voters. Assessment and Payment of Tax. Persons who were assessed and paid the taxes necessary to qualify them as voters between October 1 and November 1 preceding the election, and were then registered as voters, were illegally assessed and were not qualified to vote at such election.

Notice of Meeting. Irregularity in will not avoid Election. Where the notice of the meeting for the election was irregularly signed and posted, but the meeting was fairly conducted and no voter deprived of any right, or stayed away from the polls by reason of the informality, it was *held* that such irregularity would not affect the election.

Failure of Town Clerks to meet to ascertain Result. Where the clerks of the four towns, composing the district, did not meet to compare records and ascertain the result, but, owing to a storm, one town clerk failed to appear, so that the vote of that town was not counted or canvassed in preparing the certificate of election, — it was *held* that the certificate issued was void, and the result of the election was ascertained by canvassing the votes cast in the district.

GEORGE A. KING *for petitioner.*
HOSEA M. KNOWLTON *for sitting member.*

The Committee on Elections, to whom was referred the petition of Beriah T. Hillman for an inquiry into the conduct of the election in District No. 1, in Dukes County, whereby a certificate was issued to Stephen Flanders, as representative from said district, after having two hearings in their room at the state

house, and being unable to ascertain the facts in the case, proceeded to Vineyard Haven, in the town of Tisbury, in said county, as authorized, where they heard the evidence presented and the arguments of counsel for both parties.

The petitioner claimed that Flanders was not legally elected, and his certificate void, for the following reasons: —

First, that, by reason of the storm that prevailed at the time of the election and the roughness of the water, the town clerk of Gosnold was unable to, and did not, attend the meeting of the town clerks held at noon of the day following the election as provided by law; and that the vote in said town of Gosnold was fifteen for the petitioner and two for Flanders, and should now be counted.

Second, that there was no legal election in the town of Gay Head: first, in that there was not a legal warrant calling the meeting posted in said town; second, in that no voter in said town had been legally assessed and paid a state and county tax within two years.

Third, in that twenty-five, or more, persons were illegally assessed and voted in the town of Tisbury, and all voted for the sitting member.

Fourth, in that one I. W. Silovet, in the town of Edgartown, voted his tax-bill by mistake, intending to have voted for the petitioner; and that, after he discovered his mistake, he returned to the polls and offered to vote for the petitioner, and that his vote was wrongfully refused by the selectmen, and should now be counted for the petitioner.

The petitioner prayed for a recount of the votes in the town of Tisbury, on account of informality in that method of counting the same; and in the town of Chilmark, on account of an alleged change in the books of the town clerk of that town; and finally prayed that the petitioner might be declared elected, or a new election ordered, by reason of the informalities and errors aforesaid.

At the hearing, it was agreed that the town clerk of Gosnold failed to attend at the meeting of the town clerks of the district, as provided by law, and that the vote of Gosnold was not counted or canvassed in preparing the certificate to the sitting members; and that the vote of Gosnold was, as set forth in the petition, viz., fifteen for Beriah T. Hillman and two for Stephen Flanders.

It was further agreed that the vote as canvassed by the town clerks was as follows: —

	Stephen Flanders.	Beriah T. Hillman.
Edgartown,	101	307
Tisbury,	258	49
Chilmark,	65	37
Gay Head,	23	1
	447	394
That Gosnold should have been counted as follows: —	2	15
	449	409

It was further agreed that I. W. Silovet voted his tax-bill in Edgartown, and that he afterwards offered to vote for Beriah T. Hillman, and that the selectmen refused to receive the same, it appearing from the check-list that he had already voted once.

It was proved, and admitted upon the part of the sitting member, that in the town of Tisbury fourteen persons were assessed and paid their taxes between the first day of October and ten o'clock in the afternoon of Nov. 1, 1879, and were duly registered and voted; and the sitting member waived the proof that they voted for him, agreeing for the purposes of the hearing, that none of them voted for the petitioner.

The greater part of the evidence heard, therefore, was as to the conduct of the election in Gay Head.

It was agreed that the town of Gay Head had been an incorporated town for about ten years; that the town officers were all of them Indians, or of Indian descent, and that the town had no by-laws regulating the calling of meetings.

Charles H. Mingo, an Indian, testified that he was one of the selectmen and assessors of Gay Head; that he prepared the notice of the meeting, which was as follows:

NOTICE.

To notify the inhabitants qualified to vote in town affairs to meet at the schoolhouse on the fourth day of November next at ten o'clock A.M., to vote for government officers. Polls will be open from ten o'clock A.M. until two P.M.

Oct. 25, 1879. Gay Head.

CHAS. H. MINGO.
THOMAS JEFFERS.

That he took the original to Thomas Jeffers, another one of the selectmen, and had him sign it, and that he posted it on the

church in Gay Head Oct. 25, 1879; that that same day he was informed by some person that it was necessary to have the notices posted; that he thereupon copied the above notice, with the exception of Jeffers' name, and posted the copy upon the schoolhouse in said town on the same day he posted the original; that this notice was removed from the schoolhouse by the action of the rain and wind, and that he prepared another copy, without the name of Jeffers, and posted in the place of the one removed; that at the election, which was held in the schoolhouse, the second copy, prepared and posted as aforesaid, was read; that he personally took down the one posted upon the church, and had it present at the hearing, and that that was the original, signed by him and Jeffers. The church is about one-fourth mile from the schoolhouse, and they are the only two public buildings in town; that there were thirty-three voters on the list, and that twenty-four voted. He further testified that the total tax assessed for state, county, city and town purposes, including highways, for the year 1878, was $350. That the taxes assessed for 1879 were, —

State tax,	$5 00
County tax,	43 95
Town tax,	400 00
Total,	$448 95

Thomas Jeffers testified that he was a selectman and assessor in said town; that Mingo brought in the notice testified to, and that he signed the same; and that he afterwards saw it posted — he thought upon the schoolhouse, but it might have been on the church; that he signed the same and saw it posted before election; that there were thirty-three voters, and that twenty-four voted. Of those who did not vote he knew that George J. Blaine didn't vote. Abram Radman was at the meeting, but didn't vote. Louis Cook didn't attend. John Foster was fishing at Noman's Land; he had talked with him about the election, and he said he shouldn't come in to it. Thomas Manning was sick in bed. Samuel Haskings was in New York; went there about Oct. 1. A. H. Cooper was not there, but knew of the election. H. W. Pease, the light-keeper, didn't attend, but knew of meeting; and that Valentine Womblay was at sea. He never heard of any complaints in town as to informality of notice.

Israel D. Rose testified that he was town clerk and selectman; that he recorded notice originally with the name of but one selectman, but afterwards added Jeffers' name, being informed by the

selectmen that both names were upon the original, posted at the church.

Aaron Cooper testified that he was collector of Gay Head; that he saw the notice on the church three or four days before election, and that it was signed by both Mingo and Jeffers.

William A. Vanderhoof testified that he talked with George J. Blaine about the election before November 4, but Blaine neglected to vote.

A. H. Cooper testified that he knew of the election, but didn't vote. The informality of warrant was not the cause.

Captain Benjamin Clough testified that he was the defeated candidate for county commissioner at this election; that he talked with Mingo about the notice, and Mingo told him that Jeffers signed the same November 5, and after the election, and at the request of parties from out of town, Mingo and Jeffers, being recalled, both denied this fact, and testified that the notice was signed and posted before the election.

It was proved that the State tax for 1878 was $10.00, and paid to the State Treasurer Dec. 26, 1878. That the State tax for 1879 was $5.00, and was paid Jan. 3, 1880.

In the matter of the town clerk's records in Chilmark, J. W. Tilton testified that he was town clerk; that the declaration of the vote made in open town meeting was, for Stephen Flanders, sixty-five votes; for Beriah T. Hillman, thirty-seven votes; and that he made a true record of said declaration, writing out the numbers and following the same with figures; that he afterwards noticed that the figures following the word sixty-five were liable of being read "55," and that he erased the first figure, and wrote the figure 6, over the same. This was all the error or change proved upon which to base the petition for a recount in that town, and your committee followed the long established rule that the official returns are *prima facie* correct, and that the petitioner must show fraud, irregularity, or a reasonable presumption of an error in the count (see *Barr et al., Pets., ante*, p. 254; *Morse* v. *Lonergan ante*, p. 288; where the house refused to recount the votes).

In the town of Tisbury it appeared from the evidence that the ballots were divided into four different bundles, and that each bundle was counted by a different person, and that no one man verified the count. Your committee, considering this a somewhat careless way of counting, proceeded to count the votes in said town, and found that the whole number of ballots cast was 307, that

Stephen Flanders had	255
Beriah T. Hillman had	49
Blank	3
	307

The vote, as declared, showed that Flanders had 258 votes, and the recount showed that there was an error of three to be deducted from the vote of Stephen Flanders.

Your committee was satisfied, from the evidence, that the meeting in Gay Head was openly and fairly conducted; that no voter was deprived of any rights by reason of the informalities in the notice of the meeting; and that no voter stayed away from the meeting by reason of the same. That although the notice was irregular, that it was the act of the "plain people" of that town, and posted in good faith upon the part of the officers of the town. *

*[NOTE BY THE EDITORS. *Informality in Notice of Meeting for general Elections, not affecting the Result, will not invalidate the Election.* The informalities in the notice of the meeting in the above case were also before the supreme judicial court, upon an information in the nature of *quo warranto* to test the validity of the election of county commissioner, made up at the same time; and the court, agreeing with the committee, *held*, that such informalities, not preventing a full, free and fair vote, and not affecting the result, should not invalidate the election: "The provisions of the statutes which have been disregarded in this case we think are not of the essence of the thing required to be done, by complying with which jurisdiction or authority to hold an election was obtained, but they regulate the form and manner in which the meeting for an election, required by law then and there to be held, should be called." *Commonwealth* v. *Smith*, 132 Mass. 289, 296, published in the supplement hereto. It must always be presumed, until otherwise proved, that the notice of the meeting was legal and sufficient. *Gilmore* v. *Holt*, 4 Pick. 258.

Other authorities go even farther, and hold that the entire absence of the formal notice provided by statute of an election, the time and place of which are prescribed by law, will not necessarily invalidate the election. In such cases the notice is merely additional to that given by the statute, but the right to hold the election comes from the statute, and not from the official notice. In New York, it is *held*, that if the election is fairly conducted, and substantially all the electors had knowledge of it, although no formal notice was given, the election is valid; but if the omission of the statutory notice is fraudulent, or the election was thereby prejudiced, then such omissions may invalidate the election. *People* v. *Peck*, 11 Wendell (N. Y.), 604; *People* v. *Runkel*, 9 Johnson (N. Y.), 147; *Marchant* v. *Langworthy*, 6 Hill (N. Y.), 646. If the election was held at the proper time and place, and by the proper officers, the *notice* has no bearing on the merits, and is merely technical; *Battis* v. *Price* 2 Pearson (Penn.), 456. And so, in the following cases, it was *held* that an election fixed and required by statute, which was otherwise regularly conducted, would not be invalidated by absence of the official notice; *Lafayette* v. *State*, 69 Ind. 218; *Jones* v. *Gridley*, 20 Kansas, 584; *People* v. *Hartwell*, 12 Mich. 508; *People* v. *Witherell*, 14 *Ib.* 48; *McCraw* v. *Harralson*, 4 Coldwell (Tenn.), 34, 39; *Dishon* v. *Smith*, 10 Iowa, 212; *State* v. *Orvis*, 20 Wis. 235.

Electors must have in Law or Fact Knowledge of Meeting for Election. The authorities are not fully agreed upon the question whether publication of official notice is essential to the validity of an election to fill a vacancy in office, where the statute provides that such vacancy shall be filled at the next general election. In *People* v. *Cowles*, 13 N. Y. 350, the court *held* that an election to fill a vacancy, which had

They were further satisfied that a state and county tax had been duly assessed within two years, and that the state tax, at least,

occurred but a week or two before the election, in the office of judge, was legally made at the general election, although no official notice was given of the election, and apparently only a small number of the electors participated in it. The California Court refused to follow this decision, *McKune* v. *Weller*, 11 Cal. 49; *People* v. *Martin*, 12 *Ib.* 409.

The best test, supported by the weight of authority, seems to be, not whether the electors were served with *official notice* of the meeting for the election, but whether as a body they had *knowledge* of it. If the election is to fill a vacancy in office, under a general statute provision fixing the time and manner of filling such vacancy, then the electors may perhaps be bound to know the requirements of the law, but they cannot be presumed to know, in the absence of lapse of time or other circumstances, the fact that any vacancy exists. So, in Ohio, an election to fill a vacancy of which but a small minority of the electors had knowledge, was *held* invalid, the court saying: "In deciding this case, however, we do not intend to go beyond the case before us, as presented by its own peculiar facts. We do not intend to hold, nor are we of opinion, that the notice by proclamation as prescribed by law, is *per se* and in all supposable cases, necessary to the validity of an election. If such were the law, it would be in the power of a ministerial officer by his misfeasance always to prevent a legal election. We have no doubt that where an election is held in other respects as prescribed by law, and *notice in fact* of the election is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid. But where, as in this case, there was no notice, either by official proclamation, or in fact, and it is obvious that the great body of the electors were misled for want of the official proclamation, its absence becomes such an irregularity as to prevent an actual choice by the electors, prevents an actual election in the primary sense of that word, and renders invalid any semblance of an election, which may have been attempted by a few, and which must operate, if it be allowed to operate at all, as a surprise and fraud upon the rights of the many." *Foster* v. *Scarff*, 15 Ohio St. 532, 537; *State* v. *Cogswell*, 8 *Ib.* 620. In Kansas, the court affirms the distinction: "If such notice was given, the voters could not ignore the notice and refrain from voting; or, if the body of voters were in fact to receive notice in any other manner, probably they would not ignore it; or if sufficient facts should come to the knowledge of the body of the voters to put them upon inquiry, possibly they could not ignore the election. This has been so held, where the election was held at the same time and place of some other election which called out substantially all the voters, and the matter was discussed among the voters, and a large proportion of them voted upon the subject." *Wood* v. *Bartling* 16 Kansas, 109, 113; *Light* v. *State*, 14 *Ib.* 489. So, in Wisconsin, the election of a sheriff to fill a vacancy in the office, at the next general election held after the vacancy occurred, as provided by statute, but without publication of the notice prescribed by the statute, was held valid, *State* v. *Orvis* 20 Wis. 235; at least where the body of electors had actual notice, *State* v. *Goetze*, 22 Wis. 363. But if the fact of the vacancy was not generally known, and the statutory notice was not given, so that the great body of electors who voted for other offices at the election, did not vote to fill the vacancy, such election was void, *State* v. *McKinney*, 25 Wis. 416. And see *Bolton* v. *Good*, 12 Vroom (N. J.), 296.

Notice of Special Election is essential. Where the election is special; that is, called at a special time by precept of the senate or house of representatives to fill a vacancy in that body, or by other authority conferred by law, so that it is necessary to appoint a time for the election, notice of such election is essential to its validity. In such case, the right to hold the election is not derived directly from a statute prescribing the time, but comes from the precept, warrant, or other official act, which appoints and must state the time. Such election depends for its legality upon such official act, and not directly upon the statute. *Wood* v. *Bartling*, 16 Kansas, 109.

had been collected and paid. There were some discrepancies between the amounts assessed and the amounts voted by the town, but not sufficient to invalidate the state tax. Your committee, therefore, follow the law as laid down by Mr. Justice Morton in Strong. Pet., 20 Pick. 484:

"What shall be the consequence of an omission by the selectmen or town clerk to perform any of these prescribed duties, and upon whom shall it fall? For a wilful neglect of duty the officers would undoubtedly be liable to punishment. But shall the whole town be disfranchised, by reason of the fraud or negligence of their officers; this would be punishing the innocent for the faults of the guilty. It would be more just and more consonant to the genius and spirit of our institutions, to inflict severe penalties upon the misconduct, intentional or accidental, of the officers, but to receive the votes whenever they can be ascertained with reasonable certainty."

This doctrine we believe has lately been adopted and enunciated by the supreme court of the State of Maine. (*Opinion of Justices*, 70 Me. 560.)

The town clerks having failed to meet as required by law, and the certificate issued to the seated member being void by reason of the neglect of duty upon the part of the town clerk of Gosnold,

The court in New Jersey recognizes the distinction: "In the election of an officer for a regular term, the not giving notice may not invalidate, for a contrary doctrine would put it in the power of a clerk, through ignorance, carelessness, or design, to set aside a regular annual election, the place and time of which are fixed by law; but where the election is to fill a vacancy, the time and place of holding which are to be fixed by the chief executive or some other power, the notice is essential, not only as to the fact of the vacancy, and the object of the election, but the time and place for depositing the ballots. In the former case, the right to hold the election, at the time and place fixed and between the hours designated, is derived from the statute; in the latter, it proceeds not only from the law, but also by virtue of the proclamation and notice, all of which are necessary to constitute a legal election." *Morgan* v. *Gloucester City*, 15 Vroom (N. J.), 137, 142. And so in Illinois, it was recently *held* that: "Where the time and place of an election are fixed by law, an omission to give the proper notice of the election will not vitiate an election held on the day appointed by law; but where the law fixes no time or place of holding the same, leaving that to be determined by some authority in the statute, after the happening of some condition precedent, it is essential to the validity of the election that it be called, and the time and place thereof fixed by the very agency designated by law and none other." *Stephens* v. *People*, 89 Ill. 337. That a special election requires official authority and notice, see also *Clark* v. *Board of Supervisors*, 27 Ill. 305; *Marshall Co.* v. *Cook*, 38 Ill. 44; *Force* v. *Batavia*, 61 Ill. 99; *State* v. *Young*, 4 Iowa, 561; *Secord* v. *Foutch*, 44 Mich. 89; *McPike* v. *Pen*, 51 Mo. 63; *Barry* v. *Losee*, 5 Coldwell (Tenn.), 588. But even in such special election, called by proper authority, if notice of the time officially appointed for the election is in fact given, there is no authority for holding that mere informality in the mode of serving the notice will necessarily invalidate the election. Such informalities would probably have no more effect upon a special election called and fixed by proper authority, and of which the electors had actual notice, than they would have upon a general election held under statute authority. Cases *supra*.

your committee, following the precedents in *Stimpson* v. *Bre[illegible]ed*, *ante*, p. 257, and *Haines* v. *Hillis*, *ante*, p. 300, proceeded to can[illegible]vas the votes cast in said district, to ascertain who was duly elect[illegible]ed, and find that the votes cast were as follows: —

	For Flanders.	For Hillm[illegible]n.
Edgartown	101	307
Tisbury	255	49
Chilmark	65	37
Gay Head	23	1
Gosnold	2	15
Total	446	409

Making Flanders' majority 37. Deducting the 14 votes whi[illegible]ch were illegally assessed, and paid after Oct. 1, 1879 (see *Opinion[illegible]n of Justices*, 18 Pick. 575), Flanders still has a majority of 23.

As these 14 do not affect the majority, they do not affect th[illegible] validity of the election. *Sudbury* v. *Stearns*, 21 Pick. 148; *Trustee[illegible]e in Blandford* v. *Gibbs*, 2 Cush. 39; *Christ Church* v. *Pope*, 8 Gray [illegible] 140.

The committee did not consider it necessary to give any weigh[illegible]ch to the case of I. W. Silovet.

The committee, therefore, recommend that the petitioner have [illegible] leave to withdraw.

[The report of the committee was accepted. H. J., 1880, p. 144.]

Azel Ames, Jr., *v.* Lucius Beebe.

House Document, No. 99. February 13, 1880. Report by J. M. Cochran, *Chairman*.

Recount of Votes refused. Where the votes for representative were counted by the town clerk and one selectman, each verifying the count of the other; and, owing to irregularities in the election in allowing voters after depositing ballots for representative in the box for ballots for other officers to return to the polls and deposit ballots for representative in the proper ballot-box, it would be impossible to ascertain the true result of the election by a recount, the votes will not be recounted by the house of representatives.

Irregularities in Conduct of Election. Striking names from the voting list, without proper inquiry, and restoring them to the list by one selectman, without consultation with the other selectmen, and without proper inquiry into the qualifications of the persons whose names are so restored, are serious irregularities in the conduct of the election; but, upon a waiver by the petitioner of any right to the seat, based upon the illegality of the votes of such persons, the election will stand.

ALBERT E. PILLSBURY *for petitioner.*
S. K. HAMILTON *for sitting member.*

The Committee on Elections, to whom was referred the petition of Azel Ames, Jr., for a recount of votes for representative in the eleventh Middlesex district, have heard a large number of witnesses, and the counsel for both parties. The petitioner alleged that the count and declaration of the votes were erroneous for the following reasons: —

1. Because the votes cast at said election were not counted at any one time, or by any person as a whole, but were counted by various persons, and at various times, during the day.

2. Because the checking of the names of the voters, and the counting of the votes, were loosely, carelessly, and irregularly conducted in several respects.

3. That the highest vote cast for any candidate at said election, being the vote for governor, was declared to be eight hundred and nine, while the number of names checked upon the voting list is eight hundred and eighteen.

4. That there appeared to have been twenty-nine more votes cast for governor than for representative; and petitioner believed, from information, that the number of persons who voted for governor, and not for representative, was less than that number.

5. That all votes for representative were deposited in one ballot box, and all votes for other officers in another and separate box, while but one check was used for both votes; that in some instances persons deposited their votes for representative in the box appropriated to other officers; and in other instances persons who had passed the ballot boxes, returned, and were allowed to vote for representative, although their names were already checked as having voted.

6. That the names of four persons were added to the voting-list after the time allowed by law therefor had expired, and that said four persons were allowed to vote, and voted for Lucius Beebe, the sitting member.

7. That one Malcom, a resident of Stoneham, and never a legal voter in Wakefield, was allowed to vote; and one Hardy, who had removed from Wakefield prior to said election, and not then a legal voter, was allowed to vote, and voted for said Lucius Beebe.

8. That twelve other persons, who could neither read the Constitution nor write their own names, and were not legal voters, were allowed to vote at said election, and voted for said Beebe.

And prayed for a recount, and that said irregularities might be inquired into, and that he might be awarded the seat now held by said Lucius Beebe.

The charges made in the eighth allegation were waived and not pressed at the hearing, and no evidence was offered as to so much of the seventh allegation as related to one Hardy.

It was agreed that there were 818 names checked upon the list of voters, and that the vote for all the candidates for governor was 809; while the vote for representatives was declared as follows: —

Lucius Beebe of Wakefield, ...	392
Azel Ames, Jr., of Wakefield, ...	383
William S. Greenough of Wakefield, ...	2
Joshua Whittemore of Wakefield, ...	3
	780

Upon the question of the counting of the ballots, we had the following testimony: —

Charles F. Hartshorn testified that he was town clerk of Wakefield; that he and John S. Eaton, one of the selectmen, had charge of the counting of the ballots; that the boxes were opened and the ballots removed by Eaton and himself five times during the day, and the ballots taken from the boxes, counted each time by both parties, each verifying the count of the other, and that Eaton kept a record of each count, which was shown; that the only question of doubt was, whether they had counted the vote of one Malcom which was challenged. They thought they didn't count it in their first count. They found votes for representative in boxes for votes for state officers, and one vote for state officers in a representative box; that they preserved the votes for representative found in the state box, but didn't count them. There were thirteen representative votes in state boxes. The check-list and ballots were duly sealed and preserved.

John S. Eaton, one of the selectmen, confirmed Mr. Hartshorn's evidence as to the method of counting the votes, and, in addition, said he was one of the selectmen who struck off Malcom's name, as it was shown to them that he lived in Stoneham; that his name was erased because he was a non-resident.

Thomas Winship, testified that he gave the selectmen the information the Saturday previous to the election, that Malcom was a non-resident; that he challenged his vote on the day of election,

and that he was allowed to vote, and voted for Beebe. It was shown that the warrant for the election called for the votes for state and county officers upon one ballot, and for representative upon a separate one, to be cast into separate boxes.

James Oliver, testified that he was chairman of the board of selectmen in Wakefield; that the check-list was divided into two parts; that he had charge of so much of the same as contained the names from A to K, and that Mr. Burbank, another selectman, had charge of the rest; that they were stationed at each end of a table upon the platform, and each had two boxes — one to receive the state and county votes, another to receive the representative votes. That each man was assisted by a policeman to guard the boxes and raise the cover when persons desired to vote. That voting was taking place at both desks, and in all the boxes at the same time. That Mr. Burbank had charge of his list all day, except a time at noon when Mr. Oliver had charge of both lists, Mr. Burbank going to get a lunch. That, in many cases, parties voting at the boxes where he was stationed, only voted the state and county ticket, saying they did not care to vote for representative at that time; and he checked their names upon the list, and wrote them upon a slip of paper he had upon his table, and kept for that purpose. That afterward many of these returned and voted; but when the polls were closed he had a list of nineteen who had voted for state and county officers, and not for representative. That in one case he saw a man put in two ballots; that he took out one and pushed the other in; that several parties put both their ballots into the state box, and afterwards some of them returning and representing these facts to him, he allowed them to vote for representative in the right box. Could n't say the number. Several did this; might be four or five. When the state boxes were opened, there were found to have been thirteen votes for representative put into the same. Don't know who voted the second time for representative, or for whom they voted. Polls opened at 9 A.M.; closed at 4.45 P.M. Registration closed at 10 P.M. Saturday night, and the collector was there with list of those who had paid taxes; and they crossed off all who it appeared had not paid a tax for two years. Don't know why Malcom's name was taken off the list. He appeared Tuesday and demanded the right to vote; showed a receipted tax bill for the year 1879, and I put his name on, and allowed him to vote. He was challenged by Mr. Winship, but I received his vote, as he said he was a voter. Did this without consulting other members of the board. I have since learned that his house was just across the line into Stoneham. The name of Patrick O'Keefe was stricken off because we thought he was dead; had seen the death

of such a man. He appeared at the polls Tuesday, and demanded the right to vote, and showed that he had paid his tax; and I put him on the list, and he voted. Can't say why we struck off the name William O'Neil, — think for non-payment of taxes; and don't recall D. J. O'Donovan or Wiggins' cases. I put them and Patrick Brown on after the polls were open, because I found that they had paid their taxes to the treasurer before the time for closing registration. Brown did not vote; the others did. I considered it a "clerical error or omission," within the meaning of the statutes, where we struck off names for non-payment of taxes, and afterwards finding that they had paid them, put them on accordingly. Don't recollect Smith's case. Five or six in all were put on after the opening of polls. Didn't know other members of board had struck Malcom's name off for non-residence, — thought it was for non-payment of taxes.

B. B. Burbank, one of the selectmen, testified that he had charge of half of the list. He didn't allow people to vote at different times, and kept no list for that purpose; should say ten or more voted for state and county officers who didn't vote for representative, but didn't keep any tally. He lunched about 1 P.M. and Mr. Oliver had charge of both lists while he was gone. He was present at registration Saturday. Malcom's name struck off because he had moved from town. He lives in Stoneham. Eaton struck him off. Didn't have anything to do with adding names after opening of polls. Knew Bernard Smith, but didn't recollect taking his vote.

J. Batchelder testified: saw Smith vote between twelve and one o'clock, — Oliver was in charge of both lists at that time. Smith put both tickets into box for state officers, and came down into the audience. There was discussion about his not voting in representative box. Oliver said he could come back and vote for representative, and he went back and voted in the representative box; the other vote not taken from State box.

Charles E. Niles saw party put two pieces of paper into State box. Afterwards Oliver took one out about the size of representative ticket, and passed to him, and he put it into representative box. Didn't know the man, or how he voted.

Patrick O'Keefe, William O'Neil, and D. J. O'Donovan were all called, and testified that their names were put on the list during the day of election. Had all paid taxes previous to Saturday before; but upon being inquired of as to who they voted for, the counsel for the sitting member objected to their testifying upon that subject, and they refused to state for whom they voted.

It appeared, however, by secondary evidence, that Malcom, O'Keefe and O'Neil, had stated that they voted for Lucius Beebe, the seated member.

The evidence introduced by the sitting member was chiefly to throw discredit upon the testimony of J. Batchelder, and offers to show that the petitioner was an unpopular man with the party nominating him. At the close of the evidence the petitioner stated to the committee, that if his claim to the seat turned upon the votes of those men who were put upon the voting-list after the opening of the polls, he would waive any claim or right to the seat, as prayed for; but asked the committee to recount the votes.

Your committee are of the opinion, taking the evidence of Messrs. Hartshorn and Eaton, that the votes cast in the representative boxes were carefully and correctly counted; and that, owing to the irregularities in the conduct of the election, and the allowing of some parties to vote a second time, after having once voted for representative in the State boxes, so complicated matters that it would be impossible for them to ascertain by a recount the true facts in the case, without going into the questions which the petitioner has waived.

Your committee are fully of the opinion that the use of two check-lists, and four boxes upon one table, with the necessary confusion of having two polling places in such close proximity; the allowing of parties to vote and checking them upon the regular list, and then making a supplementary list, distinct from any official list; the allowing of parties to vote for representative a second time, they having once voted in the wrong box; the striking off of names without careful and proper inquiry, and the putting of the same on to the list after the opening of the polls without consultation with others members of the board, and proper inquiry as to the cause of their being struck from the list, as in Malcom's case, are evidence of gross carelessness and serious irregularities in the conduct of this election, and have led to their natural consequences — presumed errors and confusion.

It is but just to say that there is no evidence whatever to connect either of the candidates in any way with these irregularities.

The petitioner waived any claim or right to the seat in this house if the same shall turn upon the right to vote of those persons placed upon the list after the opening of the polls; and your committee are of the opinion that the election does turn upon such votes.

For the reasons hereinbefore stated, your committee refused to recount the votes in said district, and report that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1880, p. 204.]

George A. Cushing, Petitioner.

House, unprinted. January 22, 1880. Report by Robert L. Spear.

Recount of Votes refused.

[In this case the petitioner prayed for a recount of votes for representative in the fifth Norfolk district, on the ground that "he believes he was elected and that he is deprived of his seat by a mistake in the counting of the ballots cast for representatives." The committee reported: They have heard the statements of the petitioner and the sitting member from said district. The petitioner gave as a reason for asking a recount that it appeared by the returns that he received a less number of votes than the combined votes of Messrs. Butler and Adams (democratic candidates for governor) in the town of Quincy, and thought there must be an error in the count. Your committee, following the precedents of this house, as shown in *McManus*, Petitioner, *ante*, p. 215, report that the petitioner have leave to withdraw. The report of the committee was accepted. H. J., 1880, p. 65.]

HOUSE—COMMITTEE ON ELECTIONS, 1881.

Messrs. SUMNER ALBEE of Cambridge, *Chairman;* CHARLES O. PARMENTER of Amherst, JAMES A. CROWELL of New Bedford, IRA Y. KENDALL of Athol, OLIVER W. ROBBINS of Pittsfield, EDWARD P. BUTLER of Boston, and TIMOTHY A. MURPHY of Boston.

EMERY GROVER *v.* JAMES MCINTOSH.

House Document, No. 97. February 16, 1881. Report by C. O. PARMENTER.

[In this case the votes of the town of Needham were recounted by the committee, on the ground that, after having been duly counted and sealed up as required by law, they were deposited and remained for two weeks, in the town safe, in the town house, — the combination of the lock being known to the selectmen, to the chairman of the school committee, and to the janitor of the building, so that the votes *might have been* tampered with. As *recounting* votes that had been tampered with would merely make the fraud successful, the case is of no value as a precedent. BUSHROD MORSE *appeared for the sitting member.*]

W. F. CLAFLIN ET AL. *v.* OWEN WOOD.

House Document, No. 150. March 14, 1881. Report by Messrs. ALBEE, PARMENTER, CROWELL, KENDALL and BUTLER; — Messrs. ROBBINS and MURPHY dissenting.

Petition for seat. Parties. It is not necessary that the party claiming the seat, or entitled to it, if the sitting member is ousted, should bring the petition for the seat, or even sign it with others.

Recount of Votes granted. Where the vote of a town as first counted would elect the petitioner, and by a recount four less votes were found for him, so that the sitting member was returned by a plurality in the district, — the committee, considering it probable that a mistake was made in the count, recounted the votes of that town.

Registration of Voters. Time of. A person cannot be registered as a voter after the expiration of the time fixed by law, and if not qualified then he has no legal right to vote, so that where a person does not pay the tax, necessary to qualify him

as a voter, until the day of election, the payment is made too late to entitle him to vote at such election, and his vote, if cast, must be rejected.

Qualification of Voters. Residence. A person unmarried, born and brought up in Franklin, residing there with his parents until May, 1879, then going to work in Hopkinton, remaining there, except for the period from November, 1879, to February, 1880, which period he spent with his parents in Franklin, being taxed in both towns in May, 1880, but asking for an abatement in Hopkinton on the ground that he was taxed in Franklin and wanted to retain his home there, because for part of the year he was without work in Hopkinton, paying his tax there only upon a tax warrant against him, and getting it abated after the election, paying his tax in Franklin, was not a resident of Hopkinton qualified to vote there in the election of 1880.

Same. Register of Voters as Evidence. The fact that a person's name is on the register of voters in a town is not conclusive that such person is a qualified voter in such town, but in an election controversy his qualifications can be inquired into by the house of representatives, and if found unqualified, his vote will be rejected.

ALBERT E. PILLSBURY and T. G. KENT *appeared for petitioners,* and submitted the following authorities to the effect that the contestant himself need not petition unless he chooses: —

To the effect that the validity of an election may be inquired into on motion, without petition from any person: *Hopkinton* case, Mass. Election Cases, Cushing, S. & J. 6; *Dunstable, Ib.* 15; *John Williams, Ib.* 19; *Steere's* case, *ante*, p. 20.

For a case in which the selectmen petitioned for an investigation into the election, *Sheffield* and *Mt. Washington*, Mass. Election Cases, Cushing, S. & J. 46; a case in which the petitioner who claimed the seat was himself ineligible, notwithstanding which the house unseated the sitting member, *Jenkins* v. *Shaw*, *ante*, p. 266.

In which other persons than those claiming the seat have petitioned: *Haws* v. *Darling*, *ante*, p. 18; *Howe's* case, *ante*, p. 3; *Day* v. *Taft*, *ante*, p. 35; *Pierce* v. *Brown*, *ante*, p. 92; *Pease* v. *Rowell*, *ante*, p. 108; *Wait* v. *Ingalls*, *ante*, p. 133; *Keith* v. *Mayhew*, *ante*, p. 239; *McGibbons* v. *Walden*, *ante*, p. 289.

Cushing's work on Law and Practice of Legislative Assemblies, § 150.

McCrary on Elections, § 350.

PATRICK A. COLLINS *appeared for sitting member.*

The Committee on Elections, to whom was referred the petition of W. F. Claflin and others, for a recount of the votes cast for representative in the thirtieth Middlesex district, and for an investigation of certain alleged illegal voting for representative in said district, have met the petitioners and the sitting member, heard their evidence and the arguments of counsel, and have considered the same, and present the following report: — 1. The petitioners represent that the votes for representative in said district were not correctly counted, and that, if they had been, the result would have

shown that John A. Woodbury and not Owen Wood, the sitting member, was elected and is entitled to a seat in this house, and they pray for a recount of said votes.

2. They further represent that, if said count is correct, the said John A. Woodbury is still entitled to a seat, because they say that twenty-one persons not entitled to vote for representative at said election were allowed to vote, and did vote, all of whom cast their votes for said Owen Wood; and that, if said illegal votes had been rejected, the said John A. Woodbury would have been found and declared to have been elected as representative of said district; and they pray for an investigation of the matter of said illegal voting, and that said John A. Woodbury may be awarded said seat, if found entitled thereto.

At the hearing, counsel for the sitting member objected to any proceedings under the petition, because it was not the petition of the party claiming the seat, and because he had not even signed it jointly with the other petitioners, and claimed that the petitioners had no right to contest the seat of the respondent. But the objection was overruled, the committee being of the opinion that on principle and by precedent the petition was properly brought. See Cushing on Law and Practice of Legislative Assemblies, § 150, and also McCrary on Elections, § 350. This has been the practice in Massachusetts for at least twenty-five years. It appeared that, when the vote of Ashland was first counted, it was announced that 232 votes had been cast for John A. Woodbury, which, if correct, would have elected him by a plurality of one vote; but on a subsequent recounting it was found that Ashland had given him but 228 votes, which was the number as finally allowed him in the official return; and as it seemed to the committee not improbable that a mistake might have been made, and especially as the majority in the whole district was so small, they decided to recount the vote of the district, which they did with the following result, viz.: —

In Hopkinton the whole number of votes cast was . . .		873
of which Owen Wood had	486	
and John A. Woodbury had	387	
In Ashland the whole number was		360
Owen Wood had	132	
John A. Woodbury had	228	

Making the result in the district as follows: —

Whole number, ...		1,233
Owen Wood had	618	
John A. Woodbury had	615	

Giving Owen Wood a plurality of three votes.

Among the ballots in Ashland the committee found one *sticker* on which was printed "For representative, Owen Wood," which did not have the appearance of having been pasted on any ballot and fallen off; and whether some person cast it as a vote for representative, or whether it got among the ballots by accident, or in what other way it came there, the committee are unable to decide. They did not include it in their count.

The committee next proceeded to consider the second part of the petitioner's claim, to wit, the illegal voting.

On motion of the counsel for the sitting member, the petitioners were ordered to file written specfications of the grounds on which they claim that illegal votes were cast, and they by their counsel filed the following: —

HOUSE OF REPRESENTATIVES.

In the matter of the petition of CLAFLIN *et als., that the seat of Representative of the Third Middlesex District be awarded to* JOHN A. WOODBURY.

SPECIFICATIONS UNDER PETITION.

The petitioners expect to prove, under said petition, the following facts: —

1. That one L. H. Wakefield voted in Hopkinton at the election in controversy, and voted for Owen Wood for representative, said Wakefield not being a legal voter at said election, in that he had not paid in accordance with law, any tax assessed upon him within two years, so as to entitle him to registry as a legal voter.

2. That one Timothy Connolly voted at said election in Hopkinton, and voted for Owen Wood for representative, said Connolly not being a legal voter at said election, in that he was not an inhabitant of said Hopkinton, but was, and for more than six months previously had been, an inhabitant of the town of Franklin.

3. That twenty-two other persons voted in Hopkinton at said election, and voted for Owen Wood for representative, said twenty-two persons not being legal voters, in that they could not at the time of said election read the Constitution of the Commonwealth, and write their own names, and not being within any of the exceptions prescribed by article 20 of the amendments to said Constitution.

A. E. PILLSBURY,
For the Petitioner.

Having obtained leave of the house the committee went to Hopkinton, taking with them a stenographer, and spent one afternoon and evening taking testimony, and examined a large number of witnesses. The subsequent hearings were had at the state house.

First Specification. — By Statute of 1879, chap. 37,* in "all towns" registration ceases at ten o'clock in the afternoon of the Saturday next preceding the day of any election. And the committee are of the opinion that a voter cannot qualify after that time

* Pub. Stats, chap. 6, sect. 23.

and if not qualified then he has no legal right to vote at the election. It clearly appears on the testimony that one Lucius H. Wakefield had for many years resided in Hopkinton and voted there; that the taxes assessed upon him for the years 1879 and 1880 were in no part paid till the forenoon of election day, November the second, — when in the town hall, while the voting was going on, he sought out the collector of taxes, and paid to him his poll tax (two dollars), as he says, for 1880. The taxes assessed upon him for 1879 were paid subsequently to a constable of the town, and received by the collector of taxes Nov. 29, 1880. Until the payment of the two dollars on election day, he had not paid any tax assessed upon him within two years of the election, and that payment was made too late to qualify him to vote. Nevertheless he voted at said election.

Second Specification. — It appears that Timothy Connolly was, at the time of the election, twenty- two years and seven months old; that he was unmarried; that he was born in the town of Franklin, where his parents have for a long time resided, and that place had always been his home, certainly until he came to work in Hopkinton in May, 1879. He states that he had been at work in Hopkinton all the time since, except from November, 1879, to February, 1880, which interval he spent with his parents in Franklin. He was taxed in May, 1880, in Hopkinton and in Franklin, a poll tax. When called upon to pay his taxes in Hopkinton, he applied to the assessors to have them abated, on the ground that he was taxed in Franklin and wanted to retain his home there, for the reason that for a part of the year he was without work in Hopkinton. He was finally compelled to pay his tax to a constable on a tax warrant against him. He also, or some one for him, paid his tax in Franklin, and he brought his receipted tax-bill to the assessors in Hopkinton, pressed his application for abatement, and some time soon after the election it was abated, as appeared by the testimony of one of the assessors, and by a certificate of abatement of taxes in Hopkinton put into the case. He voted in Hopkinton. A majority of the committee are of the opinion that it was clearly his intention to keep up his residence in Franklin, and that he had so expressed his intention; and, notwithstanding his vote in Hopkinton, his intent still to be domiciled in Franklin was apparent by his pressing his claim for the abatement of his poll tax in Hopkinton after the election was over.

Third Specification. In regard to the third specification, the committee find that the following persons voted in Hopkinton at said election who could not at the date of said election write their names, and neither of whom was within any of the exceptions

named in article 20 of the amendments to the Constitution, viz.: John O'Brien, John B. Donnelly, Michael McLaughlin, John Hefferan, Patrick Flaherty, Thomas O'Connell, Martin Curran.

In regard to all these persons, witnesses who had known them for a long time, and whose business had required them to take of them receipts for money paid, testified that they said they could not write, — that in giving their receipts they had never signed their names, always making their cross after their names had been written by others; and there was no evidence offered that either of them ever had or could write his name or anything else.

And the committee find that all these nine persons, Lucius H. Wakefield, Timothy Connolly, John O'Brien, John B. Donnelly, Michael McLaughlin, John Hefferan, Patrick Flaherty, Thomas O'Connell and Martin Curran, voted for Owen Wood for representative. Wakefield testified that he so voted. Mr. Woodbury testified that he was present and saw Wakefield and John O'Brien deposit ballots for Owen Wood. Connolly told Mr. Woodbury that he voted for Wood, and John B Donnelly testified that he told one Madden that he voted for Wood, although on the witness-stand he declined to state for whom he voted. Connolly and Donnelly, as well as all the others above named, were reputed to be democrats, always had acted with that party, and by canvassing committees and others active in the politics of the town had always been classed with that party, and were so classed at the last election. And there was no evidence offered or claim made that either of them had ever acted or voted otherwise than with that party. There were but two candidates voted for, for representative: Owen Wood, democrat, and John A. Woodbury, republican. *Vide* Cushing's Law of Legislative Assemblies, § 199. McCrary on Elections § 298, 299, 300.*

Counsel for the sitting member introduced the register of the town of Hopkinton in evidence, and the names of all the persons found by this report to have voted illegally were found entered thereon; and it was claimed that this register was conclusive evidence of the qualification to vote of all persons whose names were found thereon, and that the committee could not go behind the register and inquire into the qualification of any such person, except for fraud duly alleged and proved. But a majority of the committee were of a different opinion, and overruled the point taken.

(A copy of the evidence on the second branch of the petition,

* As to proper evidence to prove how person voted, see *Palmer* v. *Howe*, *ante*, 145, and editorial note with authorities thereto.

was taken down by the stenographer, and reported by the committee.)

The conclusions to which the majority of the committee have come make the vote as follows: —

The whole number of votes returned for Owen Wood was, . .	618
Deduct illegal votes cast for him, ...	9
Leaves the whole number of legal votes cast for Owen Wood, .	609
Whole number of votes cast for John A. Woodbury, . . .	615
Deduct the number of legal votes cast for Owen Wood, . . .	609
Leaves a plurality for Woodbury of, ...	6

The majority of the committee therefore report the accompanying resolution.

[The resolution declared that the petitioner was duly elected, and entitled to the seat. The resolution was rejected by the house, H. J., 1881, p. 411, so that the sitting member retained his seat. Notwithstanding the action of the house, the editors publish the report of the committee as valuable as a precedent. They doubt, however, whether the action of the committee in recounting the votes for the reasons stated, is in accordance with the practice and precedents established by the house.]

SENATE, 1883.

Special Committee on Returns of votes for Senators: HON. EDWARD P. LORING, HON. WALTER N. MASON, and HON. CHARLES A. SAYWARD.

PETITIONS OF JOHN B. WHITAKER AND JOHN W. CUMMINGS.

Senate Document, No. 9. January 16, 1883. Report by all the Committee.

Ballot, Form of. The provisions of the statute (Pub. Stats. chap. 7, sect. 1), that officers shall be voted for upon one ballot, are directory; and where a voter took the regular ballot of one party, and erased from it all names but that of the candidate for governor, and then took the regular ballot of the opposing party and erased from it only the name of the candidate for governor, and then placed the two papers in an envelope, and deposited it in the ballot-box, it was *held*, that the vote for senator upon such ballot should be counted.

Envelope. Use of Unofficial. A ballot enclosed in a colored envelope, not of the kind prescribed by the statute, and deposited in the ballot-box, without challenge or objection from the election officers, or notice that it was not of the proper kind, should be counted; although the statute (Pub. Stats. chap. 7, sect. 4), provides that no other envelope than those prescribed shall be used at the polls.

Qualification of Voters. Naturalization. While it will be presumed that an alien born person, voting at an election, has been naturalized, the presumption is overcome by proof that he had not been in the country the required length of time to be entitled to naturalization, neither the voter himself nor his certificate of naturalization being produced before the committee; and his vote should be rejected.

Qualification of Voter. Name not on Check-list. When the name of a person is not on the voting list, and he has not asked to have it placed there, he has no right to vote, and if he votes, his vote should be rejected.

Same. Name stricken off in one Ward. Where the name of a person is on the check-list in a ward of a city, and he has a right to vote in that ward, he has no right to vote in another ward of the city, and if he so votes, his vote should be rejected.

CHARLES J. NOYES *for Mr. Whitaker.*

The Committee on Returns of Senatorial Votes, to whom was referred the petitions of John B. Whitaker and John W. Cummings, each claiming to have been elected senator in the second Bristol district, have duly considered the same, and report as follows: —

At the election for senator in the second Bristol district, 6,137 votes were cast for senator in said district; of these, John B. Whitaker had 2,917, John W. Cummings had 2,917, Joseph W. Osborne had 290, and all others 13, as appeared from the returns from said district; and there was declared to be no choice.

At the hearing the only matters in dispute were relative to 4 votes cast in the city of Fall River in said district.

John B. Whitaker, the republican candidate for senator in said district, claimed that a vote cast by Samuel Sumner in ward 6 for said Whitaker, which was rejected by the ward officers and by the mayor and aldermen in a recount made by them on Nov. 9, 1882, should be counted; and that a vote cast by one William Isherwood for John W. Cummings, the democratic candidate for senator in said district, which was counted by said ward officers and by said mayor and aldermen, should not be counted, because said Isherwood was of foreign birth, and had not been naturalized.

On the other hand, said John W. Cummings claimed that said Sumner's vote should not be counted, because it was not upon one ballot, and because it was put in a common envelope instead of the statute envelope, and because the envelope was not sealed.

Said Cummings also claimed that the vote of John T. Graham, which was cast in ward 1 for said Whitaker, and which was counted for him, should be rejected, for the reason that said Graham was not a voter in said ward, and his name was not on the check list of said ward.

Said Cummings also claimed that a vote cast in ward 5 by Edward Mitchell for said Whitaker, and counted for him, should be rejected, because said Mitchell's name was not upon the check list of said ward.

It appeared in evidence that Samuel Sumner was a legal voter in ward 6, that he was duly registered, and his name was upon the check list of said ward.

That said Sumner went to the ward-room, obtained a regular democratic ticket, and with a pencil erased all the names therefrom except that of Benjamin F. Butler for governor, and procured a regular republican ticket on which was the name of John B. Whitaker for senator, second Bristol district, and erased therefrom the name of Robert R. Bishop for governor, and retaining all the other names thereon, including that of John B. Whitaker for senator, second Bristol district, and folded the two tickets thus erased and put them in a colored envelope, but not the one prescribed by the Public Statutes, chap. 7, and endorsed on said envelope his name and street on which he resided, to wit: "Samuel Sumner, 51 Canal Street," and deposited the same in the ballot-box.

It did not appear that Sumner asked for the statute envelope, or that the warden notified him that the envelope used by him was not the right kind, or gave him any information about the matter.

Neither did it appear whether the envelope was sealed at the

time it was deposited in the box, or not. The vote was not challenged.

The Public Statutes, chap. 7, sect. 1, provides that in the election of national, state, district and county officers, the same shall be voted for on one ballot.

The committee are of the opinion that this provision of the statute is directory, "and as there could be no doubt of the intent of the voter, and no uncertainty as to the whole number of ballots cast," the fact that it was on two separate pieces of paper does not invalidate it. *Case of Danvers*, Mass. Election cases, Cushing, S. & J. 648.*

The same chapter of the Public Statutes, sect. 12, provides that no vote shall be received by the presiding officers at any election provided for in this chapter, unless presented for deposit in the ballot-box by the voter in person, in a sealed envelope, or open and unfolded so that such officers can know that only one ballot is presented. Section 4 of the same chapter provides for supplying voters with self-sealing envelopes, and that such envelopes shall be of uniform size and color, and bear the arms of the Commonwealth, and that no other envelopes shall be used at the polls.

When the envelope system was first adopted, chap. 226, Acts of 1851, the statute contained an express provision that a vote deposited in any other manner than in a statute envelope and sealed should not be counted. But when this act was amended, making it optional with the voter to use the envelope or not, that provision was stricken out from necessity, but the provision could readily have been modified so as to apply to all ballots cast in any other than the statute envelope, but it was not done.

A recent act of the legislature, incorporated in the Public Statutes, chap. 7, sects. 14, 15 and 16, after describing the size of the ballot, kind of paper, color of ink, size of type used in printing the same, and providing a penalty for any violation in these respects, expressly provides that any want of conformity in these particulars shall not authorize the refusal to receive or count any such ballot.

* [NOTE BY THE EDITORS. *Ballot may be on separate Papers.* A case similar to the above arose in Kansas, and the court, taking the same view as the committee, *held* that, — "A ballot, where several officers are to be voted for, is not necessarily invalidated and to be rejected because consisting of two pieces of paper; and where, in such case, one piece of paper contains only the title of certain township officers and the names of the candidates therefor; and the other only the titles and names of the county officers and candidates therefor; — and the voter folds the one piece of paper within the other, and offers it to the judges of election as a single vote; and it is so received and deposited by them in the ballot box, and the whole is done in good faith and the voter is a qualified elector, the vote so cast should be received and counted." *Wildman* v. *Anderson*, 17 Kansas, 344. And see *Coffey* v. *Edmonds*, 58 Cal. 521.]

There is no warrant for rejecting a ballot cast in such an envelope unless the statute expressly provides for doing so, or unless, when all the legislation upon the subject, now in force, is taken together, such intention becomes apparent.

There is no express provision of law for rejecting a ballot cast in an ordinary envelope; and when the present statutes upon the subject of elections, the manner of conducting the same, and the method of obtaining the will of the electors through the ballot-box, are examined, it becomes evident that it is not the design of the statutes to nullify the will of the voter in such manner.

Under our statutes ballots are to be counted, although different from the statute size, and although upon several pieces of paper, when the letter of the statute requires them to be on one; and in case of several ballots for the same person found in one envelope, one of them shall be counted, although it is unlawful for the voter to deposit more than one. It seems, therefore, to be contrary to sound reason and the spirit of our statutes and the judicial and legislative construction of them, to hold that a ballot cast in good faith and without fraud by a legal voter, who has complied with all the provisions of law which entitle him to deposit his ballot, should be rejected because it was deposited in the ballot-box in a common envelope instead of the one prescribed by the statute.

Again, it was the duty of the warden to have refused the ballot, and directed the voter to use the statute envelope.

But no such duty was performed by that officer, in this case; and to refuse to count a vote thus ignorantly deposited by a voter, would open the door to gross frauds on the part of election officers, who might intentionally let and encourage voters to deposit their ballots in such envelopes, in order that they might be rejected in the count, and thus materially affect the result in the interest of one party or the other.

There was no evidence as to whether the envelope was sealed or not when it was deposited. The only evidence upon the subject was that it was unsealed when it was taken out of the box by the counting officers.

The presumption is, till the contrary appears, that the envelope was sealed when it was deposited. *Case of North Chelsea*, Mass. Election Cases, Cushing, S. & J. 644.

The committee are therefore of the opinion that none of the grounds presented for rejecting the Sumner vote are tenable, and that it should be counted for John B. Whitaker.*

* [NOTE BY THE EDITORS. *Counting Ballots deposited in unofficial Envelopes, or not of the Form prescribed by Statute.* The question whether ballots in unofficial envelopes, or not in the form prescribed by statute, can be counted, is a question of statute

It further appeared in evidence from the warden, that one Wil- William Isherwood entered the ward-room of ward 5, and approached the ballot-box to deposit his ballot, that his name was called and checked, and he had his hand over the box, with the ballot in his

construction. Unless the statute expressly or by necessary implication forbids the counting of such ballots, they should be counted, if once deposited in the ballot-box, even if irregular in form. The general rule for the construction of election statutes is thus stated by Judge *Cooley*: "Election statutes are to be tested like others by statutes, but with a leaning to liberality in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated and not otherwise, their provisions designed merely for the information and guidance of the officers must be regarded as directory only, and the election will not be defeated by a failure to comply with them, provided the irregularity has not hindered any who were entitled from exercising the right of suffrage, or rendered doubtful the evidences from which the result was to be declared." Constitutional Limitations (5th ed.), p. 777. As a rule, however, negative words in a statute, expressly forbidding the counting of informal votes, make the statute mandatory, — and such votes must be thrown out in an election controversy. So in Missouri, under a statute providing that all ballots cast should be numbered, and that unnumbered ballots should not be counted, it was *held* that the election of an officer by unnumbered ballots was invalid. *West* v. *Ross*, 53 Mo. 350. And under a by-law of a religious society, that ballots containing anything besides the names should not be counted, — the court in Pennsylvania *held* that ballots upon which an eagle was engraved could not be counted. *Commonwealth* v. *Woelper*, 3 Ser. & R. (Penn.) 29.

For the purpose of securing to the voter the privilege of secresy, necessarily involved in ballot-voting, many of the States have prescribed by statute, the size, color, type, etc., of the ballot to be used, and expressly provided that no other ballots shall be counted But these statutes have almost invariably received a liberal construction from the courts in passing upon the question, whether the ballots in question conformed to the statute requirement. So, paper tinged with blue was regarded as "white" within the meaning of the statute. *People* v. *Kilduff*, 15 Ill. 492. The words "Republican Ticket" on the ballot were not regarded as a distinguishing mark or embellishment, in *Stanley* v. *Manly*, 35 Ind. 275. Nor were the words "City Union Ticket," *Druliner* v. *State*, 29 Ind. 308. Printing the names on the ballot so that they could be seen through the paper, does not invalidate it. *State* v. *Adams*, 65 Ind. 393. If the statute prescribes simply plain white paper for the ballots, no grade, quality, or thickness of paper is required, and absolute uniformity is not necessary. *State* v. *Wasson*, 99 Ind. 261. And see for similar decisions, *Turner* v. *Drake*, 71 Mo. 285; *Roller* v. *Truesdale*, 26 Ohio St. 586; *Applegate* v. *Eagan*, 74 Mo. 258; *Millholland* v. *Bryant*, 39 Ind. 363; *People* v. *Bates*, 11 Mich. 362. In *Kirk* v. *Rhoads*, 46 Cal. 398, the court distinguishes, under the California statute, between matters over which the elector has no control, and matters entirely within his control: — "Whether the paper on which his ballot was printed was furnished by the secretary of state or not, or upon paper in every respect *precisely* like such paper, or whether it is four inches in width and twelve inches in length, or falls short of the measurement by an eighth or a sixth or a fourth of an inch, or whether it is printed in long primer capitals or not, or whether it is single or double leaded; these are matters over which the great majority of electors have no control, and about some of which they are entirely ignorant. The ballots are always furnished on the day of election by committees appointed for the purpose by the respective political parties, or by independent candidates or their friends. The elector in but few instances ever sees these tickets until he approaches the polls to cast his ballot, and it would be absurd in the extreme to require him to have a rule by which he could measure and ascertain whether his ticket exceeded or fell short of twelve inches in

hand, when his right to vote was challenged by United States Supervisor James Crowther; that Isherwood dropped the vote just as he was challenged; that the vote fell on the edge of the box, and hung part in and part out of the box; that the warden asked

length, by a sixth of an inch, or only by an eighth of an inch, or whether the color of his ticket was of the exact shade of the paper furnished by the secretary of state. Again, not one elector in five hundred knows the difference between long primer capitals, or any other capitals, or whether his ticket is single or double leaded.

It is impossible that he should know, or be able to determine these facts. . . . . There are, however, other requirements of the code within the power of the elector to control, and these, if wilfully disregarded, should cause his ballot to be rejected. He can see, for instance, that his ballot is free from every mark, character, device, or thing that would enable any one to distinguish it by the back; and if in wilful disregard of law, he places a name, number, or other mark on it, he cannot complain if his ballot is rejected and he loses his vote." (pp. 406, 407.) And see *Wyman* v. *Lemon*, 51 Cal. 273.

Where the Statute does not forbid the counting of such informal Ballots, they should be counted. The present statute in Massachusetts regulating the form of ballot expressly provides, that "nothing herein contained shall authorize the refusal to receive or count any ballot, for any want of conformity with the requirements of this section" Pub. Stats. chap. 7, sect. 14. In regard to votes enclosed in envelopes, the statute requires that "such envelopes shall be of uniform size and color, and bear the arms of the Commonwealth, and no other envelopes shall be used at the polls." Pub. Stats. chap. 7, sect. 4; and "no vote shall be received by the presiding officers at any election provided for in this chapter, unless presented for deposit in the ballot-box by the voter in person, in a sealed envelope, or open and unfolded." Pub. Stats. chap. 7, sect. 12. The only negative words in the statute regarding envelopes forbid the use or possibly, the *reception*, of votes in unofficial envelopes; but do not forbid the counting of such votes if once received in the ballot-box. The statute in this respect is somewhat similar to the statute in Maine, of which the justices of the Supreme Court recently said: "The presiding officers are to determine whether the ballot offered has a distinguishing mark or figure, so that, if rejected, the voter may procure a ballot, if he chooses, to which no exception can be taken. But if the ballots have distinguishing marks or figures, it is no part of the duty of the officers of the town to make any report in reference thereto. They should reject the ballot, if offered, when it is within the prohibition of the statute. The statute prohibits the rejection of the ballot 'after it is received in the ballot-box.' It is then to be counted. . . . . When the ballot has been once received in the ballot-box, neither the selectmen nor the governor and council can refuse to count it." *Opinion of Justices*, 70 Me. 560, 566.

As the counting of votes, once received, in unofficial envelopes is not expressly prohibited, the case seems to the editors to come within that class of cases where the court refuses to import into a statute provision regarding elections, an implication which will make it mandatory in its effect, and thereby defeat the *bona fide* vote of a qualified voter. Cooley Con. Lim. (5th ed.), pp. 776, 779; McCrary Elections, §§ 126, 133; *People* v. *McManus*, 34 Barb. (N. Y.), 620. And see the language of the court in holding that *printed* votes were *written* votes within the requirement of the Constitution. *Henshaw* v. *Foster*, 9 Pick. 312. The editors do not attempt to reconcile the decision of the senate in the above reported case, with that of the house of representatives in 1858, in *Taft* v. *Cole*, *ante*, p. 45. The high character of the Committee on Elections in that year gives additional weight to the decision of the house in that case. But in the light of the recent legislation and in that of the decisions of the supreme judicial court (see *Clark* v. *Board of Examiners*, 126 Mass. 282, 285, and *Commonwealth* v. *Smith*, 132 Mass. 289, 296), the editors regard the decision of the senate in the above case as correct. As the object of the envelope is mainly to

him if he still insisted upon the right to vote, and he answered in the affirmative, whereupon the warden took up the ballot, having the name of John W. Cummings on it for senator, and made the following endorsement thereon, to wit:—

"Isherwood, William, challenged by Supervisor James Crowther for being an illegal voter." And the warden then put the ballot into the box, and this ballot was counted for John W. Cummings.

Isherwood was arrested immediately by the United States marshal, and carried to Boston.

It was claimed that Isherwood was born in England, and had not been naturalized. James Crowther testified that he knew him, and that he had not been in this country three years at the time he voted. United States Marshal George Low testified that after his arrest, and while on the road to Boston, Isherwood told him he had not been in this country three years.

It also appeared that efforts had been made to find Isherwood, and bring him before the committee to testify; but he could not be found, and John W. Cummings testified that he was frightened, and kept out of reach. His naturalization papers were not produced.

Isherwood was duly registered, and his name appeared upon the check-list of ward 5.

Judge McCrary, in his Treatise on American Law of Elections, § 294, says: "It seems to be quite well settled that where one who is alien born has voted at an election, the law presumes that he has been naturalized until the contrary is shown."

"But," he adds, "the very great difficulty of proving that a person has not been naturalized, would seem to require that slight proof ought to be sufficient to shift the burden. Thus, if it be shown that he claimed that aliens had the right to vote, or if he had made declarations or admissions to the effect that he had not been naturalized . . . . . the presumption that such a voter was duly naturalized ought to be regarded as so far overcome as to require the party seeking to sustain his vote to produce affirmative evidence of his naturalization."

In the light of this principle the committee are of the opinion that the vote of Isherwood should be rejected.

conceal, and make secret the ballot, and that object can be as well attained in one envelope as in another, it would seem, as said by Mr. Justice Field in *Commonwealth* v. *Smith*, *ubi supra*, that "the provisions of the statutes which have been disregarded in this case are not of the essence of the thing required to be done"; and whether they are directory or mandatory to the election officers in cities and towns, "upon a case of a controverted election, brought before a legislative body vested with the power of determining the election," they may well be held directory only.]

As to the vote of John T. Graham, it appeared that Graham had lived in ward 2, and that previous to the assessment of taxes for 1882 he moved to ward 1 ; that he was assessed in both wards, and when he went to pay his taxes, was told that his tax in ward 1 would be abated.

It also appeared that Graham's name had been on the check-list of ward 1, and was stricken off from that list on the Monday afternoon prior to election. His name was on the check-list of ward 2, and he was entitled to vote in that ward.

On election day Graham went to the ward-room of ward 1, obtained a regular republican ticket on which was the name of John B. Whitaker for senator for the second Bristol district, and procured a statute envelope, put this ballot into it, sealed it, and endorsed his name on the envelope, and deposited it in the ballot-box for ward 1, and the warden checked his name, although it was stricken off the list by two lines drawn through it with a pen. This ballot was counted, both by the ward officers and the aldermen, in the recount for John B. Whitaker.

The Public Statutes, chap. 7, sect. 9, provides for a list of the qualified voters for each voting precinct, and also expressly provides that no person shall vote at an election whose name has not been previously placed on such list, and the supreme court has held that such regulation "is highly reasonable and useful, calculated to promote peace, order and celerity in the conduct of elections, and as such to facilitate and secure this most precious right to those who are by the Constitution entitled to enjoy it," and that it is a valid and binding law, "to which both voters and presiding officers at elections are authorized and bound to conform."—*Capen* v. *Foster*, 12 Pick. 492.

And further, Graham was not a resident of the ward in which he voted, and had no more right to vote there or have his name put on the voting list of that ward than a qualified voter of Beverly has to vote in Northampton.

Your committee are of the opinion that Graham's vote should not be counted.

As to the vote of Edward Mitchell, it appeared that he voted in ward 5, and put the ticket on which was the name of John B. Whitaker for senator, second Bristol District, into a statute envelope, sealed it, and wrote his name on the envelope and deposited it in the ballot-box of that ward.

It appeared that Mitchell's name was not upon the check-list of that ward, nor upon the list of any ward in the city of Fall River, and it was not claimed that he asked to have it put on any check-list.

This vote was counted for John B. Whitaker by both the ward officers and the aldermen.

The committee are of opinion that Mitchell's vote should be rejected upon the same ground as Graham's.

The result of the committee's findings are as follows, to wit: From the vote of John B. Whitaker, as returned, to wit: 2,917, take the votes of Graham and Mitchell, which leaves 2,915, and add the vote of Sumner, which makes Whitaker's vote, as it should stand, 2,916.

From the vote of John W. Cummings, as returned, to wit: 2,917, take the Isherwood vote, which leaves Cummings' vote as it should stand, 2,916, and the result is a tie.

Your committee therefore report that there was no choice in the election of senator in the second Bristol district.

The committee therefore report that the petitioners have leave to withdraw, and recommend the adoption of the accompanying order.

[The order provided for a precept for a new election in the district. The report of the committee was accepted, and the order was adopted. S. J., 1883, p. 45.]

CHARLES H. ALLEN *v.* JEREMIAH CROWLEY.

Special Committee on Return of Votes for Senators: Hon. EDWARD P. LORING, Hon. JOHN R. BALDWIN, and Hon. CHARLES A. SAYWARD.

Senate Document, No. 13. January 26, 1883. Report by all the Committee.

Recount of Votes granted. The fact that the board of aldermen of a city constituting a senatorial district recounted the votes cast for senator at the same time and in the same room where and when they were recounting the votes cast for representatives to the general court, the names of senator and representatives being on the same general ticket, no committee of the board, and no one member thereof counting all the votes cast for senator, but where the votes were distributed in parcels to members of the board "acting by twos," such members giving the results of their counting to the city clerk, who footed and declared the aggregate result, which was not verified by any member of the board, will warrant a recount by the senate of votes cast for senator.

FREDERIC T. GREENHALGE *for petitioner.*

This is a petition for a recount of the votes cast for senator in the seventh Middlesex district composed of the city of Lowell.

The petition alleges in substance as ground for the recount asked for, that the petitioner at the election received 4,332 votes, which was a plurality of the votes cast for senator as found and duly declared by the ward officers of the city; that subsequently and on the same day of the election the board of aldermen of Lowell pretended to recount the votes cast for senator, and declared that the petitioner received only 4,307 votes, whilst the sitting member received 4,334 votes and was elected.

The petitioner further alleged that he believed and had reason to believe that there were great inaccuracies in said recount and that many errors were made therein by reason of the "misapplication of the legal principles governing such matters." The specific prayer of the petition is that the said returns, recount and votes may be examined by the senate, and revised and corrected as law and justice may require. The committee was of the opinion that *prima facie* no ground for a recount by the senate was set forth in the petition, and called upon the petitioner, as was done in *Clapp v. Sherman*, *ante*, p. 307, to furnish specifications of any errors or inaccuracies upon which he relied, and also of all "misapplications of the legal principles governing such matters."

Whereupon, the petitioner filed with the committee a statement, the main allegations of which are that the said board of aldermen recounted the senatorial votes and the votes for representatives to the general court for the several districts in Lowell, at the same time and in the same room; and that no committee and no one member of said board counted all the votes for senator, but that the votes were parcelled out to different members of the board acting in couples, and that the results as found were given to the city clerk, who made the footing to show the aggregate result and that this footing was not verified by any member of the board.

Thereupon, the committee decided to give a preliminary hearing to the parties, and summoned the entire board of aldermen of Lowell.

At the hearing, it fully appeared that the material allegations in the specifications were fully sustained, and the committee believing that the board of aldermen had not made the "examination" provided in Pub. Stats., chap. 7, sect. 36, voted to recount the votes themselves.

Each member of the committee handled and counted every vote, and the committee declared the result to be that Hon. Charles. H. Allen had a plurality of twenty-five votes over Hon. Jeremiah Crowley, and was duly elected.

By the return of the board of aldermen of Lowell it appeared that Jeremiah Crowley had 4,334 votes and Charles H. Allen had 4,307 votes.

The committee find and report, that Hon. Jeremiah Crowley was not elected to the senate from the seventh Middlesex senatorial district, and is not entitled to hold the seat occupied by him; and that Charles H. Allen was duly elected to the senate from the seventh Middlesex senatorial district, and is entitled to take the seat therein.

[The report of the committee was accepted. S. J., 1883, p. 76.]

JOHN F. MCMAHAN *v.* JAMES A. MCGEOUGH.

Special Committee on Return of Votes for Senators — HON. EDWARD P. LORING, Hon. JOHN R. BALDWIN, and Hon. CHARLES A. SAYWARD.

Senate, unprinted. January 10, 1883. Report by Mr. LORING, *Chairman*.

Recount of Votes refused. The fact that the board of aldermen of Boston consumed not more than one hour in recounting the ballots cast in the district for senator will not justify a recount by the senate.

Same. The fact that the board of aldermen of Boston has frequently, in the past, changed the results of elections, as declared by the precinct and ward officers, by recounts of the ballots cast, will not justify a recount of the vote for senator by the senate, in the absence of evidence that the board of aldermen for the year in which a controverted election is held, habitually miscounted ballots.

Same. The senate will not recount the ballots cast for a senator in one of the Suffolk districts, because there is a possibility that a recount by the board of aldermen of Boston was erroneous and wrong.

Same. Rule that votes will not be recounted merely because the plurality is small reaffirmed.

The Committee on Return of Votes for Senators, to whom was referred the petition of John F. McMahan for a recount of the votes in the fifth Suffolk senatorial district, having met the petitioner and the sitting member, and having heard the statements of both parties, submit the following report:

The fifth Suffolk senatorial district consists of wards 13, 14 and 15, in the city of Boston. By the return of the ward officers duly made it appeared that the petitioner was elected by a plurality of 106 votes. Thereupon the sitting member asked the board of aldermen to recount the ballots. They did recount the same, and declared the result to be the election of the sitting member by a plurality of forty-one votes.

The petitioner claimed the seat for two reasons, as set forth in s petition as follows: For fraud practised by the election officers the first precinct of ward 13, where the name of the petitioner as erased or pasted over, after the ballots had been deposited in e ballot-box. Because the recount by the board of aldermen is roneous and wrong.

At the hearing before the committee the petitioner withdrew the harge of fraud and rested his case on the second specification, to it, that the recount was erroneous and wrong. The principle be- g well established that a recount will not be granted by the senate r no other reason than that the plurality against a claimant is nall, the committee called upon the petitioner to show why the count was erroneous and wrong.

Whereupon the petitioner stated that the ballots of the district question were recounted between the hours of eight and ten clock of the night of the election, and he believed that not more an one hour was devoted to that service by the board of alder- en, a time claimed by the petitioner as being too short for an curate performance of that duty.

And, second, that the board of aldermen of Boston has, so often, the past, changed the result of elections by recounts, that it is obable a mistake was made in this particular case, which another unt by your committee would be likely to detect.

Your committee, taking the case most strongly in favor of the titioner, and granting for the purpose of the argument that not ore than one hour was occupied, by the board of aldermen of Bos- n, in recounting the ballots of the fifth Suffolk senatorial district, not regard that fact as sufficient to justify them in recounting e votes.

Upon the second point, it was not claimed by the petitioner that e board of aldermen of Boston for the year 1882 habitually mis- unted ballots for officers elected by the people, and your com- ittee decline to recount the ballots because there is a possibility at the count by the said board of aldermen was erroneous and rong.

It may be well to add that the petitioner and the sitting member oth belong to the same political party.

The committee find and report that the sitting member James A. cGeough is entitled to the seat now occupied by him, and recom- end that the petitioner have leave to withdraw.

[The report of the committee was accepted. S. J., 1883, p. 31.]

HOUSE—COMMITTEE ON ELECTIONS, 1883.

Messrs. GEORGE A. O. ERNST of Boston, *Chairman;* JAMES W. SWITZ[illegible]ZER of Lynn, JAMES R. ENTWISTLE of Framingham, HERBERT L. PECK [illegible] of Taunton, SAMUEL I. RICE of Northborough, HENRY J. WHITE of W[illegible]es-ton, and FRANKLIN I. WEBSTER of Montague.

JOEL W. HARRIS *v.* DAVID M. RICHARDSON.

House Document, No. 14. January 19, 1883. Report by GEORGE A. [illegible] O. ERNST, *Chairman.*

Recount of Votes refused. Where two reputable persons, not selectmen or swo[illegible]n, assisted in counting the votes, — all votes, however, either during the election, or [illegible] its close and before the vote was declared, having been counted by the selectmen, [illegible] it was *held*, that while the practice of allowing unsworn and unofficial persons [illegible] handle and count the ballots was censurable, it is not sufficient ground for a r[illegible] count of the votes by the house of representatives.

T. G. KENT *for petitioner.*

The Committee on Elections, to whom was referred the petition of Joel W. Harris for a recount of votes cast, and that he may be admitted as representative for the second Worcester representative district, have considered the same, and report as follows: —

At the election in November last, the petitioner, according to the official returns, received 1,026 votes, and the sitting member, David M. Richardson, received 1,046 votes. The petitioner alleges that in the haste and confusion incident to the sorting and counting such a large number of votes, he believes that errors were made in counting the ballots, and that, if correctly counted, it would appear that he received more votes than the sitting member, and should have been declared elected.

At the hearing, the only evidence offered of error in the count was that in the town of Milford in said district, two persons, — neither of whom was a selectman of said town, or had been sworn, —were present, and assisted in the sorting and counting of the ballots cast in said town. It was agreed, however, that during the pendency of the election, or at its close, and before the ballot was declared, the votes were all counted by the selectmen; that the persons thus assisting were reputable, and no charge is made that they were not honest men. There was no charge of fraud of any sort, nor of specific error. But it was claimed that

as the statute (Pub. Stats., chap. 7, § 26) expressly provides that "the votes in elections for national, state, county, and district officers shall be received, sorted and counted by the selectmen," they had no right to call in outside assistance, and the mere fact of their so doing was of itself sufficient reason for assuming error and ordering a recount.

This question of the right of selectmen to appoint tellers has arisen in several different forms, in previous election cases. And, although the practice has been uniformly condemned, we find no case which decides that it is of itself a ground for recounting the votes.

In 1852, in this house, the election of the member from Chester was contested on this ground, among others, that two persons, neither of whom was a selectman, nor had been sworn, assisted in counting the ballots. The committee, in their report, say "such a practice or custom should under no circumstances exist, it being the duty of the selectmen to receive, assort and count the votes without any assistance except that of the town clerk. The ballot-box cannot be too scrupulously guarded, even by those officers to whose supervision it is entrusted, and who are sworn to the faithful performance of their duties." But it was not considered sufficient ground for unseating the member, and the petitioner was given leave to withdraw. *Case of Chester*, Mass. Election Cases, Cushing S. & J., 664. Your committee do not perceive any difference in principle between that case and the present. They concur in censuring the practice of permitting unsworn and unofficial persons to handle and count the ballots. But where, as in this case, the tellers are admitted to have been reputable men, and there is no charge of fraud or incompetence; where their work was gone over and verified by the selectmen and officially certified by them as correct, we cannot consider the mere fact that they assisted in the count as sufficient ground for inferring error or allowing a recount.

In cases arising in this house in 1875 (*McManus*, *ante*, p. 215; *State* v. *Green*, *ante*, p. 226) substantially the same point was decided in accordance with the views here expressed.

The committee therefore recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1883, p. 73.]

Franklin Pease, Petitioner.

House Document, No. 28. January 26, 1883. Report by George A. [illegible] O. Ernst, *Chairman.*

Irregularity in Count, not avoid Election. The fact that the selectmen of a tow[illegible]n, following a custom which had existed for three or four years, appointed as telle[illegible]ers three reputable persons to sort and count the votes, who, without being sworn, pe[illegible]er-formed that duty, the selectmen taking no part in the count, but simply acceptin[illegible]ng the result as correct, will not invalidate the election or return in that town.

Henry Winn *for petitioner.*

Harris C. Hartwell *for W. W. Foster.*

The Committee on Elections, to whom was referred the petitio[illegible]on of Franklin Pease, for the seat as representative from the fourt[illegible]th Franklin representative district, submit the following report: —

The fourth Franklin representative district is composed of th[illegible]he towns of Deerfield, Conway and Whately. At the election i[illegible]in November, there were three candidates for representative, — Mr[illegible]r. Foster, Mr. Allis, and the petitioner, Mr. Pease. The vote of th[illegible]e several towns in said district was, according to the returns, a[illegible]s follows: —

	Foster.	Allis.	Pease.	Total.
Deerfield,	252	132	49	433
Conway,	6	74	184	264
Whately,	60	112	32	204
	318	318	265	901

From the above table it will be seen that the total vote of the town of Deerfield was almost one-half of the total vote of the entire district — nearly equal to the total combined vote of the other towns. In Deerfield, the petitioner received but 49 votes out of a total of 433. In Conway and Whately, taken together, he received a plurality. He now asks that, in consequence of an alleged irregularity on the part of the selectmen of the town of Deerfield, the entire vote of said town shall be thrown out, and that he be declared elected, as having received a plurality in the remaining towns.

In his petition, he also alleges that the ballots were not sealed up before the adjournment of the meeting at which they were cast, as the law directs, and that there were various other irregularities in the conduct of said election in the town of Deerfield. But, at the hearing, he expressly waived this, admitting that the ballots

were sealed, and that the conduct of the election was in all respects regular, with the following exception:

The selectmen of the town of Deerfield, following a custom in vogue there for the past three or four years, appointed three tellers at the election, to sort and count the ballots. These tellers were admitted to be well known and highly respected citizens, of undoubted integrity; but they were not members of the board of selectmen, nor were they sworn. They sat at a table, some three or four feet distant from where the selectmen were receiving the ballots, and from time to time, during the day, the ballots were removed from the ballot-box by the selectmen, and turned over to the tellers, who then sorted and counted them. No member of the board of selectmen at any time personally sorted or counted any of the ballots, nor was any attempt made by them, or any of them, to verify the figures given by the tellers. They accepted the result as correct, and made their official return in accordance therewith. No claim, however, was made that, so far as the petitioner is concerned, the count was incorrect, nor that he would, under any circumstances, be entitled to more than the forty-nine votes with which he was credited.

The petitioner was represented at the hearing by counsel, who submitted a very able and elaborate brief, reviewing the precedents, and claiming that, as the selectmen had not followed the strict letter of the statute, and themselves in person "sorted and counted the ballots," the election in their town was illegal and void.

He admits, however, that although this question has been many times before the house, he "cannot find that the house has ever directly decided" it. By his own showing, from the year 1852 down to the present time, numerous cases have arisen involving the question of the right of selectmen to appoint tellers, and committees have administered orthodox condemnation; but not one has ever gone so far as to hold that their appointment invalidated the election. Is it not fair to presume, then, that if it were a ground of avoidance, some one of the committees would have so held? But he admits that none did. And he is obliged to exercise very considerable ingenuity to overcome the force of the case of *Arnold* v. *Champney* (*ante*, p. 121). In this case, the matter was squarely before the committee, and they were urged to declare the election null and void. They declined to pronounce an opinion formally, and reported the facts to the house. The house subsequently gave the petitioner leave to withdraw. Mr. Pease, through his counsel, claims that this case is not authority, because there is nothing to show the grounds upon which leave to withdraw was

given. But the question was distinctly submitted to the house for its decision, and there seems to be no reason to doubt that such decision was involved in the vote. At all events, the case has since been regarded as establishing the doctrine that the appointment of tellers is "an insufficient cause for avoiding an election."

Your committee, in reaching a decision, have been guided, to a great degree, by the words of Mr. Justice Morton, in the case of *Elisha Strong*, petitioner, 20 Pickering, 491, who, after stating the provisions of the statute touching the duties of the selectmen (among them, at elections, "to receive, sort and count the ballots") and town clerk, says: — "What shall be the consequence of an omission by the selectmen or town clerk to perform any of these prescribed duties, and upon whom shall it fall? For a wilful neglect of duty the officers would undoubtedly be liable to punishment; but shall the whole town be disfranchised by reason of the fraud or negligence of their officers? This would be punishing the innocent for the faults of the guilty. It would be more just, and more consonant to the genius and spirit of our institutions, to inflict severe penalties upon the misconduct, intentional or accidental, of the officers, but to receive the votes whenever they can be ascertained with reasonable certainty." In this case, the result of the election, so far as the petitioner is concerned, can be ascertained, not only with reasonable but with absolute certainty. It is evident, from the state of the polls, and from the evidence at the hearing, that Mr. Pease is not the choice of the district, and if a new election were to be held he could not be elected. His only chance of obtaining a seat in this house rests upon this technicality.

It is fair to say that the selectmen of the town of Deerfield do not admit that their act was illegal. They claim that they did constructively sort and count the ballots, that they had a perfect legal right to appoint tellers, that it is in accordance with precedent in their own town, and that the practice has prevailed for many years in most of the large towns in the Commonwealth.

Whether they had or had not the legal right, your committee do not undertake to decide. At the worst theirs was an honest, even if erroneous, view of the law. They acted in perfect good faith, and the petitioner was in no way injured by their act. And your committee cannot believe it wise or just, simply because of this honest error (if it is an error,) to disfranchise an entire town, and seat a candidate who received but 49 votes out of 433 cast in the town, and but 265 votes out of 901 cast in the district.

They therefore recommend that the petitioner have leave to withdraw.

[The report of the committee was accepted. H. J., 1883, p. 101.]

William W. Foster, Petitioner.

House Document, No. 42. February 2, 1883. Report by Messrs. Ernst, Switzer, Entwistle, White, Peck and Webster, — Mr. Rice dissenting.

Recount of Votes granted. Where a mistake was proved to have been made in adding votes cast for representatives, in taking the figure 11 for two ones (1.1.) making a difference in the result of nine votes against the petitioner (the election having been declared a tie), the votes will be recounted.

Harris C. Hartwell *for petitioner.*
Henry Winn *for Silas W. Allis.*

The Committee on Elections, to whom was referred the petition of William W. Foster for a recount of votes cast in and for the seat as representative for the fourth Franklin representative district, having duly considered the same, beg leave to make the following report: —

From the official returns made by the town clerks in said district, it appeared that the two leading candidates for representative had each received the same number of votes, the election resulting in a tie. The petitioner alleged, however, that the votes cast in the town of Deerfield had not been correctly counted and added. In support of this allegation, he produced the original tally-sheet kept by the tellers, who sorted and counted the votes on election day (*vide Franklin Pease, Pet., ante*, p. 374), from which it appeared that an error had been made in adding the petitioner's votes. On this tally-sheet a portion of the petitioner's vote was set down thus: 11.3.3.1.1., etc.

In adding, the tellers mistook the "11" for two ones (1.1.), making a difference in the result of nine votes against the petitioner. Col. B. F. Bridges, Jr., one of the tellers, testified that it was quite late in the afternoon, about dusk, when the additions were made, and that he had no doubt whatever that there was a mistake.

Upon this evidence, the committee regarded it as its plain duty to recount the votes, and accordingly summoned the town clerk of Deerfield to appear with the ballots. The result is as follows: —

	Original.	Recount.
Foster,	252	265
Allis,	132	131
Pease,	49	52
McClellan,	–	1

Showing a gain of thirteen votes for Foster, a loss of one for Alli[illegible]s, and giving the petitioner, Mr. Foster, the election by fourteen plu[illegible] rality.

The committee, therefore, beg to report the accompanying reso[illegible] lution.

[The resolution declared that the petitioner was duly electe[illegible] representative, and entitled to the seat. The resolution wa[illegible] adopted. H. J., 1883, p. 146.]

HOUSE—COMMITTEE ON ELECTIONS, 1884.

Messrs. JAMES HEWINS of Medfield, *Chairman;* LORRIN P. KEYES of Ne[illegible] Marlborough, THOMAS A. OMAN of Pittsfield, CHESTER H. GRAY o[illegible] Prescott, GEORGE ELWELL of Rockport, EDWIN L. BURNHAM of West [illegible] minster and JOHN E. WARD of Boston.

HENRY AUGUSTUS BAKER *v.* GEORGE H. HUNT.

House Document, No. 78. February 5, 1884. Report by JAMES HEWINS, *Chairman.*

Recount of Votes granted. Where the votes in a town were counted by the town clerk alone, during the election, until two-thirds of the whole were counted, and the remainder were counted, some by the clerk and some by one of the selectmen, neither verifying the other's count, and a mistake of ten votes was admitted to have been made in the announcement of the vote for the petitioner, owing, as the clerk admitted in a letter to a newspaper, to "hurrying to make the announcement," it was *held*, although no objection to the mode of counting was made at the meeting, the votes should be recounted by the house of representatives.

Mistake in name of Candidate. Votes written for "*Henry P. Baker*" and "*H. P. Baker*" will be counted for Henry Augustus Baker, upon proof, that in the town where they were thrown, he was generally known and called Henry Paul Baker (Paul being the name of his deceased father); and that at the election in that town, two voters asked the town clerk what Baker's name was, and upon being told "Henry Paul," were seen to write upon their ballots.

Same. Votes for "*Henry Baker*" and "*Henry A. Baker*" will be counted for Henry Augustus Baker, although a *Henry Austin Baker* lived in the same town and was eligible to election, and although the local newspaper by mistake published the name of *Henry Austin Baker* as one of the candidates at the nominating caucus, and in the same item twice gave the name as *Henry A. Baker*, — it appearing that the

latter was not a candidate for election, and that Henry Augustus Baker was the regular candidate of his party.

Same. Evidence of Intention. A voter will not be allowed to testify for whom he intended to vote by his ballot.

Qualification of Voters. Abatement of Tax. The assessors of a town have no power to abate the tax of a voter, so as to affect his right of suffrage, except upon his application, and with his full knowledge and consent, and any attempt to abate it without such consent will be ineffectual.

Same. The assessors of a town assessed a voter there, nearly 80 years of age, for the year 1882, and afterwards, without any application from him, abated the tax on account of his age, infirmity and poverty, supposing that he could still remain a voter, and did not assess him in 1883. His name remained on the voting-list until just before the election in 1883, when although it was upon the posted list, a pencil was drawn through his name on the list in the hands of the selectmen, with a note that the reason was that he was not taxed. On the Saturday before the election, he went to the selectmen's room and paid his poll tax for 1882 to the town collector, taking a receipt, and then requested the selectmen to put his name on the voting-list, which they declined to do; — it was *held* that his name should have been placed on the voting list.

Effect of refusing to register qualified Voter. Where a qualified voter has been improperly refused the right to register or vote, and has done everything in his power to exercise that right, — and his vote, if it had been received, would have changed the declared result of the election, the election must be declared void.

CHAS. THEO. RUSSELL, JR., *for petitioner.*
ABRAHAM B. COFFIN *for sitting member.*

The Committee on Elections, to whom was referred the petition of Henry Augustus Baker for a recount of the votes cast in the town of Rockland for representative from the ninth Plymouth district, and for the seat as such representative, have considered the same and report as follows: —

The ninth Plymouth district is composed of the towns of Hanover and Rockland. At the election in November last, there were two candidates for representative, George H. Hunt, the sitting member, and the petitioner, both of Rockland. The vote in said towns was, according to the returns, as follows: —

	Hunt.	Baker.
Rockland,	454	538
Hanover,	229	134
	683	672

Henry Baker had	1
Henry P. Baker had	1
H. P. Baker had	1
Henry A. Baker of Rockland,	1

The petitioner claimed that the four votes for Henry, Henry P., H. P., and Henry A., Baker, were intended and should be counted for him. He also claimed that four votes were illegally cast for

Mr. Hunt; the voters not having resided for six months in the town in which they voted. It will be seen that, admitting the petitioner's allegations to be true, he was still three votes behind the sitting member, and he relied upon a recount of the votes of Rockland to change the result. The selectmen of Rockland were Charles Bearce, William Forbes and Daniel G. Wheeler. The town clerk was Ezekiel R. Studley. Mr. Studley had been town clerk for about eleven years, and had assisted in counting the ballots at State elections during that time. He occupied a table behind the selectmen, and as soon as a ballot box was full he took the ballots, counted them, and then put them into a large paper bag, where they remained until delivered to your committee. Mr. Studley counted alone until a greater part, two-thirds at least, of the ballots had been counted. Then Mr. Wheeler came to the table and both counted, but neither counted any ballots which the other had counted. Mr. Bearce stood by the ballot box all day. Mr. Forbes and Mr. Wheeler attended to the check-list until the press of voting was over, and then Mr. Wheeler went to the table with Mr. Studley and left Mr. Forbes to attend to the check-list alone. No objection was made by any one during the day to the manner in which the votes were being counted. Mr. Bearce and Mr. Forbes both testified that nothing occurred at the election which led them to think that there had been a mistake, or that the ballots were not correctly counted. The vote was declared by Mr. Studley within twenty minutes after the polls were closed. In announcing the vote for Mr. Baker he made a mistake of ten votes, giving it as 528 instead of 538. In a letter to the "Rockland Standard," he frankly acknowledged the mistake, and said it was made "*in hurrying to make the announcement.*"

It is well established by the precedents of the house that the mere fact of there being but a few votes between the number thrown for the contestant and the number thrown for the sitting member will not authorize a recount. *Burt* v. *Babbitt*, *ante*, p. 174; *Austin* v. *Sweet*, *ante*, p. 189; *Greene* v. *Bridgman*, *ante*, p. 216; *Slate* v. *Green*, *ante*, p. 226; *Taylor* v. *Carney*, *ante*, p. 228; *Morse* v. *Lonergan*, *ante*, p. 288; *McGibbons* v. *Walden*, *ante*, p. 289.

Section 26 of chapter 7 of the Public Statutes provides that the votes in elections for national, state, county and district officers *shall be received, sorted and counted by the selectmen.* It was therefore contrary to the terms of said section for the selectmen of Rockland to allow the town clerk to count the votes; and your committee, following the example of their predecessors, desire to put upon record their condemnation of such a course of proceeding. They believe that such an important matter as the counting

of votes and the determination of the result of an election has been most wisely placed in the hands of the selectmen, who, by reason of their judgment and experience, have been placed in charge of the prudential affairs of the town, and who are sworn to the faithful discharge of their duties. But however unlawful or irregular it may be for the selectmen to allow other persons to count votes, such illegality or irregularity has never been held to invalidate the election. *Strong's case*, 20 Pick., 484; *Arnold* v. *Champney*, *ante*, p. 121; *Pease*, *Pet.*, *ante*, p. 374. Coming next to the question of granting a recount on the ground of the irregularities above mentioned, your committee carefully examined the cases upon that point.

In *Monroe* v. *Cummings*, *ante*, p. 212, *it appeared that about two-thirds of the votes cast for representatives were counted during the meeting by the clerk of the board of selectmen and that no one verified his count.* The petitioner asked for a recount. A majority of the committee reported leave to withdraw. The minority were of opinion that there should be a recount. The house sustained the minority and ordered a recount. In *McManus*, *Pet.*, *ante*, p. 215, a recount was asked for on the ground that a Mr. Mason, who was not one of the selectmen, assisted in counting the votes. It appeared that all of the selectmen were present; that one of them counted all of the ballots; that they were again counted by Mr. Mason, and that the result was the same. The committee reported leave to withdraw, which was accepted by the house. In *Slate* v. *Green*, *ante*, p. 226, there were two representatives for the district. One of the sitting members received nineteen votes, and the other only six votes more than the contestant. The votes were counted by two of the voters who were invited by the selectmen to perform that service. No objection to that manner of counting was made by any one during the election. The committee held that there was no evidence which led them to doubt that the votes were correctly counted and returned, and reported leave to withdraw, which was accepted by the house. In *Sampson* v. *Waterman*, *ante*, p. 253, there was a recount, but it does not appear from the report upon what ground it was granted.

The next is *Stimpson* v. *Breed*, *ante*, p. 257. Your committee have not been able to reconcile this case with the others. Here, the clerks of the two precincts making up the district (ward 3 in the city of Lynn and the town of Swampscott), failed to meet at noon on the day following the election, to make up their return and certificates, as required by law, and did not meet until Thursday evening following. The committee held that this irregularity did not invalidate the election, but that the return and

certificate were invalid and must be set aside; and they granted a recount on that ground. This irregularity was not set forth in the petition, but appeared incidentally. In *Haynes* v. *Hillis*, ante, p. 300, the same point was raised in the petition. The town clerks not only failed to meet on the day following the election to make up their return and certificates, but never met at all. The committee said that they saw no ground to question the correctness of the conclusions arrived at in *Stimpson* v. *Breed*, to wit, that the return and certificate are invalid and must be set aside; but intimated, without deciding it, that the proper way to ascertain the result of the election was to examine and compare the records of the election in each town, and not to recount the votes. The district comprised the towns of Maynard, Sudbury, Weston and Wayland. The records of the votes of Maynard, Sudbury and Weston were not disputed, and were taken by the committee, In respect to the town of Wayland, the committee say, "having the ballots before them, they decided *upon other grounds* to recount them" This case, therefore, is not authority for recounting votes solely on the ground of irregularity in the proceedings at or after the election. See also, *Hillman* v. *Flanders*, *ante*, p. 338, where the town clerks failed to meet, and where the committee, following the suggestion in *Haynes* v. *Hillis*, canvassed the district, taking the votes as recorded in the several towns. The committee recounted the votes in one of the towns, Tisbury, but upon other grounds, as will appear below. There was a case in 1878 (*Kimball* v. *Tilton*, *ante*, p. 315 in which a recount was granted without any reason being shown therefor, but the chairman protested against the action of the committee.

In *Hillman* v. *Flanders*, cited *supra*, the petitioner, among other things prayed for a recount of the votes in the town of Tisbury, on account of informality in the method of counting the same. The committee say: "*It appeared from the evidence that the ballots in that town were divided into four different bundles, and that each bundle was counted by a different person, and that no one man verified the count. Your committee, considering this a somewhat careless way of counting, proceeded to count the votes of said town.*" In *Ames* v. *Beebe*, *ante*, p. 346 it appeared that the town clerk and one of the selectmen had charge of counting the ballots; that the boxes were opened and the ballots removed five times during the day, and counted each time by both parties, each verifying the count of the other. Held: that the votes were carefully and correctly counted. In *Harris* v. *Richardson*, *ante*, p. 372, two persons, neither of whom was a selectman, were present and assisted in the sorting and counting of the ballots; but it also appeared that all the votes

were counted by the selectmen. Leave to withdraw was reported, and report accepted by the house.

Applying the rules laid down in the cases above cited to the present case, your committee unanimously voted to grant the petitioner a recount. The manner of sorting and counting the votes in the town of Rockland was such, in the opinion of your committee, as to leave a reasonable doubt as to the accuracy of the count. The votes should have been sorted and counted by the selectmen; but that irregularity, in the opinion of your committee, has no bearing upon the question of a recount any further than this,—that there is a presumption in favor of the accuracy of the constituted officers whose duty it is, under the statute, to count the votes, while there is no such presumption in the case of other persons. They granted a recount for the reason that none of the votes were counted by more than one person.

It appeared, too, that most of the counting was done during the excitement and bustle of the meeting, and while the voting was going on so fast that it required two of the selectmen to attend to the check list. Mr. Studley admitted that he made a mistake of ten votes against the petitioner in declaring the vote, and says that he made the mistake "*in hurrying* to make the announcement." If Mr. Studley and Mr. Wheeler had gone over each other's work, and the result had remained unchanged, a very different case would have been presented. In every case where a recount has been refused there has been this check upon a mistake.

Monroe v. *Cummings* and *Hillman* v *Flanders*, cited *supra*, are direct authorities in support of the decision of your committee.

Upon recounting the votes of Rockland, your committee found that the town clerk had made a mistake of nineteen votes against the petitioner and eleven votes against the sitting member, making the vote of the petitioner 557 instead of 538, and the vote of the sitting member 465 instead of 454. By agreement of both parties, your committee then recounted the votes of Hanover, which were counted by the selectmen, and found no mistake. By the recount, therefore, the vote of the district was as follows:—

	Hunt.	Baker.
In Rockland.	465	557
" Hanover, ...	229	134
	694	691
In Rockland, Henry Baker of Rockland had . . .		1
In Hanover, Henry P. Baker of Rockland had . .		1
" " H. P. Baker " " " . .		1
" " Henry A. Baker " " " . .		1

In Rockland there were three votes for Mr. Hunt, namely, those of Ellsworth Cobbett, Lewis W. Cobbett and Asa H. Josselyn, which were challenged and sealed up in separate envelopes. The petitioner claimed that these votes were illegal and ought not to be counted, on the ground that none of said persons had resided in said Rockland for six months next preceding the election. He also claimed that the vote of Albert W. Bailey of Hanover, who testified that he voted for Mr. Hunt, ought not to be counted, for the reason that he had not resided in said Hanover for six months next preceding the election. Mr. Hunt claimed that three persons in Hanover voted for Mr. Baker, namely, Patrick Cooley, Michael McEnroe and Barney Dagin, who could not read and write; and that in Rockland, Ezra Arnold, a legal voter, would have voted for Mr. Hunt, but was unlawfully refused registration.

With reference to the votes for Henry P. and H. P Baker, it appeared in evidence that the petitioner was generally known and called by the name of Henry Paul Baker in Hanover, where said votes were cast.

Mr. Fred. M. Harrub, a member of the house, who resides in Plympton, which is about thirteen miles from Rockland, testified that he had always known the petitioner as Henry Paul Baker, and so called him, using both names, "Henry Paul."

The petitioner testified that he was forty-three years old, and was born and had always lived in Rockland; that his father's name was Paul Baker; that he, the petitioner, was sometimes called Henry Paul, or Hen. Paul, and sometimes Henry Baker, or Hen. Baker; that he was well known in Hanover, and in that town was oftener called Henry Paul than Henry Baker.

Bernard Damon, town clerk of Hanover, testified that two men came up to his desk at the election and asked what Mr. Baker's name was; that he answered, "Henry Paul;" and that he then saw them write upon their ballots. He also testified that he supposed the petitioner's name was Henry Paul Baker, and that he was so known and called in Hanover.

Isaac G. Stetson, one of the selectmen of Hanover, testified that until recently he had always known the petitioner as Henry Paul Baker.

Urban W. Cushing of Rockland, testified that he cast the "Henry Baker" ballot, and that he was personally acquainted with the petitioner. He also testified that he intended to vote for the petitioner, but your committee rejected that testimony as incompetent. (See *Hood* v. *Potter*, *ante*, p. 217.)

It also appeared that there was a Henry *Austin* Baker, who was a voter in Rockland, and that the "Rockland Standard," which

had, at that time, a circulation of about thirty-five copies in Hanover, where the "Henry A. Baker" vote was cast, in its issue of November 3d, 1883, by mistake gave the name of Henry Austin Baker as one of the candidates at the democratic caucus. Afterwards in the same item it twice gave the name as Henry A. Baker. It did not appear that any voter in Hanover actually saw this erroneous newspaper item.

Henry Austin Baker was present before your committee and testified that he was a democrat, and a voter in Rockland at the last election, but that he was not then, and had never been, a candidate for any office; that no one spoke to him or of him as a candidate, and that he received no votes; that he was not present at the caucus, and was not in town at the time; and that he had no particular friends in Hanover.

Charles H. Ellis, who cast the "Henry A. Baker" ballot, identified it, and testified that he himself wrote that name upon it, and that he was personally acquainted with the petitioner. He also testified that he intended to vote for the petitioner, but your committee rejected that testimony.

Andrew Shanahan testified that he had resided in Rockland about thirty years, and had known the petitioner about fourteen years; that he was a member of the democratic town committee, and canvassed for the petitioner before the last election; that the principal candidates at the caucus were the petitioner, Chester M. Perry, John W. Cameron, E. T. Wright and T. H. B. Whiting; and that there was no candidate by the name of Baker except the petitioner. He also testified that while he was canvassing for the petitioner, he (the petitioner) was generally spoken of as Henry Paul, or Hen. Paul.

Upon the above evidence your committee were of the opinion that all of said votes were intended, and should be counted, for the petitioner, though in the case of the "Henry A. Baker" vote they believe that they have gone a step farther than any of their predecessors have been called upon to go. *Pratt's case*, Mass. Cont. Elec. Cases, Cushing, S. & J. 236: *Chapin* v. *Snow*, *ante*, p. 96; *Wright* v. *Hooper*, *ante*, p. 100; *Coggswell* v. *McNeil*, *ante*, p. 108; *Arnold* v. *Champney*, *ante*, p. 121; *Hobbs* v. *Bartholmesz*, *ante*, p. 182; *Hood* v. *Potter*, *ante*, p. 217; *Sampson* v. *Waterman*, *ante*, p. 253; *Merriam* v. *Batchelder*, *ante*, p. 294; *Macomber* v. *Fisher*, *ante*, p. 311; Cushing's Law and Practice of Legislative Assemblies, p. 41.

Your committee next considered the votes of Patrick Cooley, Michael McEnroe and Barney Dagin, who were alleged to have voted for the petitioner, and to have been unable to read and

write; and here your committee were clearly of opinion that the allegations were not proved. There was some evidence tending to show that Cooley could not write, but there was no competent evidence as to which candidate for representative he voted for.

The next question considered was that of the votes of Lewis W. Cobbett, Ellsworth Cobbett and Asa H. Josselyn, of whom it was alleged that they had not resided in Rockland for six months next preceding the election. Though the evidence was somewhat conflicting, your committee, after carefully considering all the circumstances of each case, were of the opinion that each of said persons had resided in said Rockland for six months next preceding the election, and was a legal and qualified voter in said town. They also found, upon the evidence, that Albert W. Bailey had resided in Hanover for six months next preceding the election, and was a legal and qualified voter in said town.

Allowing these four votes to Mr. Hunt, the sitting member, as they were counted by the town authorities, and giving Mr. Baker the four votes for Henry P., H. P., Henry, and Henry A., Baker, the vote in the district would stand as follows: —

	Hunt.	Baker.
Rockland, ...	465	561
Hanover, ...	229	134
	694	695

This brought your committee to the consideration of the only remaining question in the case, namely, whether Ezra Arnold of Rockland was entitled to vote at the last election and would have voted for Mr. Hunt; and whether he was unlawfully prevented from voting.

Mr. Arnold testified that he was eighty years old last month; that he had lived in Rockland thirty years; that he had always voted the republican ticket since that party was formed, and before that time voted the whig ticket; that he had always been taxed in Rockland up to last May; that about a year ago last spring the chairman of the selectmen met him in the street and told him that his property was not valued at one thousand dollars, and was exempt; that he asked the chairman about a poll tax, and was told that he was not obliged to pay a poll tax to vote; that he told the chairman that he would rather pay a poll tax for the privilege of voting than not to vote, and that the chairman answered that it would make no difference, that he could vote just the same; that he never asked to have a tax abated and never applied to the assessors of Rockland to be exempted from taxa-

tion; that his name had been upon the voting list until the last election; that just before the election he was told that his name was not on the list in the hands of the selectmen (it appeared in evidence that his name was on the posted voting lists of Rockland, and that it remained on said lists up to the election and afterwards, and that said lists were dated Oct. 17, 1883); that when he learned that his name was not on the list which the selectmen had, he was advised by several persons to pay his poll tax for 1882; that he went to the selectmen the Saturday night before election; that they were assembled in the town hall registering voters; that he then and there, in the selectmen's room, paid his poll tax for 1882 to the collector, and took a receipt; that he took the receipt to the selectmen and asked to have his name put on the voting list; that they told him he could not have it put on; that had his name been on the list he should have voted for Mr. Hunt; that he desired to vote for Mr. Hunt and should have voted the straight republican ticket; that he did everything he knew he could do in order to vote; but that the selectmen would not put his name on the list; that he did not know why his name was not on the list; that he never gave any order to have it taken off, and expressed a desire to pay a poll tax rather than lose his vote.

Charles Bearce, chairman of the selectmen of Rockland, testified that he knew Mr. Arnold, who had resided in Rockland a long time; that his name was still on the voting list with his (Mr. Bearce's) pencil drawn through it; that in the book containing the list of voters, which was produced before your committee, there is his name, "Ezra Arnold," and under the column marked "when ceased to be a voter" is "1883," and under the column marked "why ceased to be a voter" is "not taxed"; that he inferred from that entry that Mr. Arnold paid a tax in 1881; that Mr. Arnold came in the evening of the Saturday before election and asked if he could be registered; that the selectmen told him that it was too late, that he had not paid any tax for two years, and that if he had let them know before, he could have registered. He also testified that Mr. Arnold was taxed in 1882, but that the tax was abated; that he was exempt by law before that; that they exempted him in 1882 and 1883, not thinking they were to deprive him of his vote; that he (Mr. Bearce) met him in the street two or three years ago, and told him that he had got good news for him; that he said, "You are exempt, and have never got to pay any more taxes;" that the thought of preventing Mr. Arnold from voting never entered his mind.

Daniel G. Wheeler, one of the selectmen of Rockland, testified

that Mr. Arnold was assessed in 1882 and the tax abated; that was abated on the ground that he was exempt from taxation, und the statute, by reason of age, infirmity and poverty; that they we acting under the supposition that a person so exempt was entitled to vote, and so informed Mr. Arnold; that he was assessed in 188 because they supposed it was necessary to assess him in order t keep him upon the voting list; that the selectmen decided that h was exempt, and that he could vote without paying a tax; tha Mr. Arnold came to them the Saturday night before election; tha some one had told him he would have to pay a tax in order to vote that he came with his money in his hand, and wanted to pay his tax so that he could vote; that the selectmen told him that there was no tax against him; that they had no idea at that time that he was taxed in 1882, but upon searching the records afterwards they found that he was so taxed, and that it was abated; that if they had known this they would have allowed him to pay a portion of that tax and to vote, but not being taxed in 1883 they got the idea that he was not taxed in 1882; that he wanted his name put on the voting list, and asked repeatedly to have it done; that he urged to have it done, and said he didn't see why they couldn't do it; that he said he wanted to be taxed and to vote; that they told him they didn't see how they could allow him to vote. He also testified that Mr. Arnold had voted every year till last year; that he had never asked to have his tax abated; and that he had always said he wanted to retain his right to vote; that there might something come up he should feel anxious about, and he wanted to retain his right.

Upon the above, which is the substance of the evidence, your committee were clearly of the opinion that Mr. Arnold was entitled to vote at the last election, and was unlawfully prevented from voting; and that if he had been allowed to vote, he would have voted for Mr. Hunt, the sitting member.

Judge McCrary, in his "American Law of Elections," says, on p. 48: "A case may occur where a portion of the legal voters have, without their fault, and in spite of due diligence on their part, been denied the privilege of registration. In such a case, if the voter was otherwise qualified, and is clearly shown to have performed all the acts required of him by the law, and to have been denied registration by the wrongful act of the registering officer, it would seem a very unjust thing to deny him the right to vote. In elections for *State* officers, however, under a constitution or statute which imperatively requires registration as a qualification for voting, it may be that the voter's only remedy would be found in an action against the registering officer for damages. *When*,

however, a portion of the voters of a given precinct are thus unjustly denied the privilege of registration, and another portion are duly registered and permitted to vote, no doubt is entertained but that the entire poll should be rejected, if the votes of the former class cannot be counted, and they are sufficiently numerous to affect the result." It appears that Mr. Arnold was only assessed in May, 1882, which was within two years next preceding the election. It is true that the selectmen attempted to abate the tax, but in the opinion of your committee they had no power to abate it so as to affect Mr. Arnold's constitutional right of suffrage, except upon his application, and with his full knowledge and consent.* No such application was made. The tax was never legally abated, and is still in full force. It is absurd to say that a voter can be disfranchised by the unsolicited act of a board of selectmen in abating his tax. In the case of *Weston*, Mass. Cont. Elec. Cases, Cushing, S. & J. p. 67, where a member returned was elected by a majority of one vote, and it appeared that several persons, legally qualified, who were present and desired to vote at the election, were prohibited by the selectmen from doing so, the election was held void, although it did not appear that any more than one of the rejected voters would have voted against the sitting member, if they had been permitted to vote.

The rejection of a legal vote will not invalidate an election unless the result would have been changed by its reception. *Shrewsbury*, Mass. Cont. Elec. Cases, Cushing, S. & J. 275; *Hopkinton*, *Ib.* 654; *Chester*, *Ib.* 664; *Trustees of Blandford* v. *Gibbs*, 2 Cush. 39.

As Mr. Arnold's vote, if cast, would have made a tie, and so changed the result of the election, your committee unanimously recommend that the seat held by Mr. Hunt be declared vacant, and they report the accompanying resolution.

[The resolution declared the seat vacant and the resolution was adopted. H. J., 1884, p. 158. A precept was issued for a new election. At that election the petitioner was elected, and qualified and took the seat.]

* [On the question of liability of assessors to voter for omission to tax him, so that he loses his right to vote at an election, see, *Griffin* v. *Rising*, 11 Met. 339.]

SENATE—1885.

GEORGE A. COLLINS *v.* WILLIAM COGSWELL.

Special Committee. — Hon. AUGUSTUS E. SCOTT, Hon. FREDERICK L. B[illegible]R-DEN and Hon. HENRY F. NAPHEN.

Senate Document, No. 31. February 6, 1885. Report by Mr. SCO[illegible]TT, *Chairman*, — Mr. NAPHEN, dissenting.

Recount of Votes refused. It is well settled that in the absence of proof or e[illegible]vidence of fraud in the acts of the selectmen, or of illegality in the manner of calli[illegible]g, holding, or conducting the meeting at which the election is held, or in the manner of ascertaining the result, unless the petitioner shows a reasonable ground for s[illegible]p-posing an error in the count, a recount of votes by the senate will not be made.

Same. The fact that the votes of a city, composing part of the district, were [illegible]re-counted by the aldermen upon petition, and by the recount the originally declar[illegible]ed result of the election was changed, will not justify a recount by the senate of vote[illegible]s in the towns in the district, in the absence of doubt regarding the accuracy of the[illegible] town returns.

Same. The fact that in a town, the actual counting of the votes was done by only one selectman, selected for that duty, the other selectmen participating in the sorting and adding of the votes, will not, in the absence of doubt regarding the accuracy of the count, justify a recount of the votes by the senate.

JOHN R. BALDWIN and P. J. MCCUSKER *for petitioner.*
HENRY P. MOULTON *for sitting member.*

The Special Committee to whom was referred the petition of George A. Collins for the seat as senator from the second Essex senatorial district, now occupied by William Cogswell, having met the parties and heard their evidence and the arguments of counsel, submit the following report: —

The said district comprises the city of Salem and the towns of Marblehead, Peabody and Lynnfield.

The petition alleged, and it was not disputed, that the vote for senator at the annual state election was declared as follows: —

For George A. Collins, ...	3,593
William Cogswell	3,565
J. A. Osborn, ...	384

giving said Collins a plurality of 28 votes; that upon the petition of said Cogswell, under the provisions of § 31 of chap. 299 of the Acts of 1884, a recount of the votes cast in the city of Salem

was had, resulting in a gain of forty-five for Cogswell and a loss of eight to the petitioner, giving said Cogswell a plurality of twenty-seven votes and reversing the result as at first declared.

The petition asked for a recount and alleged as reasons therefor, that in Marblehead, Peabody and Lynnfield, certain votes cast for the petitioner were not counted at all, or were erroneously counted for Cogswell or for Osborn, and that votes bearing the name of the petitioner were counted for Cogswell; that sundry votes illegally cast were counted for Cogswell, and that in the town of Lynnfield there was illegal voting.

No evidence whatever was offered in support of these allegations, and at the final hearing they were withdrawn.

It was admitted that the result as declared by the board of aldermen of Salem was correct, and that no evidence had been offered tending to show that the result of the count as declared in the towns of Marblehead and Lynnfield was incorrect.

The petitioner rested his case upon the method adopted by the selectmen of Peabody for counting the votes, and upon the justice of his request for a recount in the remainder of the district, the partial recount having reversed the result as declared at the election.

Relative to counting the votes in Peabody the following was submitted by the counsel of the parties as an agreed statement of facts: —

"Early in the afternoon the selectmen and town clerk unanimously agreed that it was advisable to remove the ballots from the box and proceed to a count. The ballots were removed, and Mr. Preston of the board of selectmen and Mr. Poor of the same board and also the town clerk proceeded to sort the votes. The manner of sorting was as follows: — All the straight tickets of each party were put by themselves in separate boxes, and all the scratched tickets of all parties were put in one box. After proceeding with sorting the tickets in the manner above described for awhile, Mr. Preston began to count the ballots sorted and Mr. Poor continued sorting.

"Mr. Preston, in counting, examined each ticket and verified the sorting done by himself and Mr. Poor; he then counted the tickets into separate packages, putting the number in each package on the back of the outside ballot of that package, and gave the same to Mr. Poor, who copied and added the numbers so given him by Mr. Preston. The straight tickets were nearly counted at the close of the polls at quarter past four, the other three selectmen attending to the check-list in the meantime. After closing the polls Mr.

Preston opened the box containing the scratched tickets, and proceeded to read each name on all the tickets taken from the box. As he read the name of a candidate one of the tellers made a mark against the name read on a slip of paper prepared for that purpose, and the marks set against the names of each candidate were added to the regular vote for that candidate by the selectmen before the vote was declared. Some of the tellers were members of the board of selectmen. The whole board were engaged in the business of the count after the polls closed.

"Peabody is a town of more than six hundred voters. The names checked, votes cast, and the number registered by the ballot box agreed."

The sitting member holds his seat by virtue of a certificate issued by the governor and council, from the returns made by the officers required by law to make them. *Prima facie*, his title to the seat is good, and he should not be disturbed or annoyed in his possession of it for frivolous reasons.

It is a well settled principle, that in the absence of any proof or evidence of fraud in the acts of the selectmen, or of illegality in the manner of calling, holding or conducting the meeting at which the election is held, or in the manner of ascertaining the result, unless the petitioner shows a reasonable ground for supposing an error in the count, a recount should not be granted.

From the agreed statement and other evidence the committee are satisfied that the sorting and counting of the votes cast at the election in Peabody were carefully done.

All the selectmen participated in it, and although it appears that the actual counting was done by only one man, he was the person selected by the board for the purpose, and he was undoubtedly fit and competent for the duty. There is no evidence that the votes cast for senator were not counted in the same careful manner as those cast for the other officers, and the committee see no reason to doubt the accuracy of the result.

The statute says the sorting and counting shall be done by the selectmen. No arbitrary rule can be laid down for their guidance. Different boards will adopt different methods, and the presumption is that as a rule each board will follow the plan which can be relied on for accuracy.

As to the claim that a recount of the votes cast in the towns in the district should be granted because a partial recount was had under the law, the committee feel that the statute wisely provides for a recount in cities in certain cases and not in towns, and that a recount should be granted in a case like this, only for the

reasons that one would be granted in a district composed wholly of towns. The fact that a recount of a portion of a district has been made by a tribunal provided by law for the purpose, in the absence of any doubt of the accuracy of the returns of the other portion of the district, is no reason for granting the petition.

The committee are aware that in a case similar to this, that of *Kimball* v. *Tilton* (*ante*, p. 315), a recount was granted. But in that case, the committee seem to have utterly disregarded the principles that have guided other committees, and the views of a dissenting member emphatically enunciating some of these principles are appended to the report.

In view of the frequency of petitions of disappointed candidates for recounts, often relying only on the good nature of committees to afford them one more chance, and wasting much valuable time of the legislature, the committee feel that the case cited is not a safe precedent to follow, and that the principle on which recounts should be granted should be rigidly adhered to.

The committee recommend that the petitioner have leave to withdraw.

Mr. Naphen of the committee, while substantially agreeing with the majority as to the facts, is unable to concur in the conclusions.

[The report of the committee was accepted. S. J., 1885, p. 138.]

HENRY SPLAINE *v.* ALEXANDER McGAHEY.

Special Committee. — Hon. AUGUSTUS E. SCOTT, Hon. WILLIAM R. SESSIONS and Hon. FREDERICK L. BURDEN.

Senate Document, No. 34. February 9, 1885. Report by all the Committee.

Election declared void. Where the petitioner was declared elected upon the ward returns by a plurality of five votes, and, upon a recount by the aldermen, the sitting member was returned by a plurality of five votes, — and the committee in recounting the votes were unable from irregularities and errors on the face of many of the ballots to ascertain how the aldermen reached that result, and it was proved that there had been fraudulent voting, and irregularities at the election, so that it was im-

possible to determine who had received a plurality of legal votes, the election was declared void.

GEORGE A. BRUCE *for petitioner.*
CHARLES J. NOYES *for sitting member.*

The Special Committee, to whom was referred the petition of Henry Splaine for the seat as senator from the third Suffolk senatorial district, now occupied by Alexander B. McGahey, submit the following report: —

The district comprises wards 6, 7 and 8 of the city of Boston, divided into sixteen voting precincts.

The contest has no political bearing, both the petitioner and sitting member belonging to the democratic party; and the number of ballots thrown for the republican and other candidates was so small they do not affect the result, and need not be considered in this report.

The count by the election officers, as declared at the election gave

McGahey,	2,495 votes.
Splaine,	2,500 "

On the petition of McGahey, under the statute, a recount by the board of aldermen was had, which gave

Splaine,	2,519 votes.
McGahey,	2,524 "

thus exactly reversing the result.

The whole number of ballots thrown for all candidates for senator was found by the election officers to be 5,740; by the board of aldermen, 5,797.

Upon evidence offered by the petitioner, tending to discredit the accuracy of the count by the aldermen, — the counsel for the sitting member not objecting, — the committee decided to recount the ballots.

The result gave for all candidates the same number found by the board of aldermen, 5,797; but in what manner the aldermen arrived at their result as between the contesting parties, the committee cannot determine.

The committee found fifty-four ballots challenged for different causes, and a large number of others with irregularities of various kinds in the vote for senator on their face, showing evidence of fraud on ignorant voters, and making it impossible to determine their intent. Many of the challenges were for the reason that the

ımes had been voted on before, and the check-lists showed a rge number of names that were checked twice.

The committee gave several extended hearings, and heard the stimony of a large number of witnesses produced by both parties, aring on the question of fraud in the election.

One of the witnesses was brought from jail, where he was awaiting sentence, on conviction for fraudulent voting in one of the ecincts of this district.

It was shown that the inspector of elections in that precinct had so been convicted for complicity in these frauds, and it was also ıown that he had been previously convicted of highway robbery ıd sentenced to confinement in the State prison for three years.

Although several of the witnesses were members or ex-members the Boston city government, or in the employ of the city, yet uch of the testimony was utterly unreliable.

Drunkenness prevailed at the election to a disgraceful extent; ıth the petitioner and sitting member were shown to be propriers of drinking saloons, which were, to a greater or less extent, e resort of vote distributors and other friends of the candidates, hough there is no direct evidence that either of them did anying personally to influence votes, or to connect them with these ıuds.

Several illegal votes were shown, beyond a doubt, to have been rown, and there was evidence tending to show that the fraud was much greater extent, comprising votes by men who did not ıide in the district, votes on names of men who had died since gistering, and on names of others who did not go to the polls.

The committee have striven hard to sift the contradictory and ıreliable evidence and to arrive at a satisfactory conclusion, but ve failed to do so.

They feel it to be their duty to state the facts and to report that is impossible to determine which of the parties is elected.

They therefore recommend the adoption of the accompanying solution.

[The resolution declared the seat of the sitting member vacant. ıe report of the committee was accepted. S. J., 1885, p. 142.]

HOUSE—COMMITTEE ON ELECTIONS, 1885.

Messrs. JESSE M. GOVE of Boston, *Chairman;* JOHN H. TOWNE of Topsfield, JOHN J. MADDEN of Boston, METCALF J. SMITH of Middlefield, FRANK J. DONAHOE of Lowell, CLEMENT P. DOZOIS of Holliston and WILLIAM H. FLYNN of Somerville.

JULIUS C. CHAPPELLE *v.* CHARLES A. PRINCE.

House Document, No. 15. January 20, 1885. Report by JESSE M. GOVE, *Chairman.*

Obliteration on Ballot. Where on the ballot, the title to the office for which a person is a candidate, viz.: that of representative, is wholly or partially obliterated by a paster for senator pasted on the ballot, the ballot will be counted as a vote for representative for the person named, — the presumption being that the voter intended to vote for such person for representative and not to have his vote inoperative.

GEORGE A. O. ERNST *for petitioner.*

The Committee on Elections, to whom was referred the petition of Julius C. Chappelle for the seat now occupied by Charles Albert Prince, have counted the ballots cast for Messrs. Prince and Chappelle in the ninth Suffolk district, and find them as follows: for Prince, 813; for Chappelle, 824. Of the votes cast for Mr. Prince, your committee found that on three ballots the title to the office for which he was a candidate was wholly or partially obliterated by the "sticker" used by the voter for senator. Of the votes cast for Mr. Chappelle, on 56 of them the title to the office for which he was a candidate was wholly or partially obliterated by the "sticker" used by the voter for senator. But your committee found that it was the intention of the voter to cast his ballot for representative for the person whose name appeared upon the ballot and not to have his vote inoperative for representative; and your committee are supported in that view of the case by the communication they have received from Mr. Prince,* the sitting member. Your committee,

* [In the communication referred to, Mr. Prince said: — "I have taken the seat because it was proper that the district should be fully represented at the outset, and because I was creditably informed that I had the greater number on the fullest count. It is my desire, however, should your committee recount the votes, that every ballot rejected for this technicality should be counted, to the end that the intention of the voter may prevail. I should perhaps also add that I should not feel justified in keeping my seat if awarded to me on such a technicality."]

therefore, find that Mr. Chappelle received 11 votes for representative from the ninth Suffolk district more than were cast for Mr. Prince, and report the accompanying resolution.

[The resolution declared that the petitioner was entitled to the seat. The report of the committee was accepted, and the resolution was adopted. H. J., 1885, p. 57. Mr. Chappelle was qualified and took the seat. *Ib.*, p. 58.]

SUPPLEMENT.

I.—OPINIONS GIVEN BY THE SUPREME JUDICIAL COURT RELATING TO ELECTIONS. 1853-1885.

II.—DIGEST OF DECISIONS OF THE SUPREME JUDICIAL COURT RELATING TO INHABITANCY AND RESIDENCE (1 MASS. TO 138 MASS. REPS. INCLUSIVE.)

III.—MESSAGE OF GOVERNOR ANDREW TO THE SENATE, APRIL 7, 1862, VETOING THE ACT OF 1862, ENTITLED "AN ACT TO DIVIDE THE COMMONWEALTH INTO DISTRICTS FOR THE CHOICE OF REPRESENTATIVES IN THE CONGRESS OF THE UNITED STATES," AND REQUIRING THE PEOPLE OF EACH DISTRICT TO LIMIT THEIR CHOICE FOR SUCH REPRESENTATIVE TO AN INHABITANT OF THE DISTRICT.

SUPPLEMENT I.

OPINIONS GIVEN BY THE SUPREME JUDICIAL COURT RELATING TO ELECTIONS. 1853 - 1885.

ADDISON WAITE *v.* JOHN T. WOODWARD AND OTHERS.

10 CUSH. 143 (1852).

It is competent for selectmen, although not their duty, to add the name of a legal voter to the voter's list, after the voting commences; but they cannot, during such time, hold a regular meeting for the correction of the list.

Action on the case against the selectmen of Hubbardston, for wrongfully refusing to place the plaintiff's name upon the list of voters in said town, and refusing to admit him to vote, at the annual election in November, 1850, and at the election of a representative in Congress in January, 1851.

The plaintiff offered to show that the defendants, after the opening of said meetings, and the list of voters had been read, made proclamation that all persons who claimed a right to vote, and whose names had not been inserted upon the list of voters, might come forward, and the selectmen would hear and decide upon their claims: That at the town meeting in January, the plaintiff did go to the selectmen before the voting began, and as soon as the proclamation was made, and requested to have his name inserted on the list, and offered proofs of his qualification: That the selectmen of Hubbardston have uniformly, for many years, heard and examined the claims of persons claiming a right to vote, and have acted upon the same, and when found qualified, have placed their names upon the lists of voters after the meetings had been opened, and after they had begun to receive votes: That at both elections, the defendants adopted that course in respect to other persons than the plaintiff, and placed their names on the list, and allowed them to vote at the first meeting, both before and after the plaintiff had made his application, and at the second meeting after he had made his application to them: That at the times mentioned in the plain-

tiff's declaration, the plaintiff made a claim upon defendants that they should place his name upon the list of voters, and that he might be admitted to vote: That they consented to hear his claim, and the proofs he offered: That they heard the same and adjudged thereon, and wrongfully refused his application aforesaid.

But the presiding judge of the court of common pleas, *Merrick*, J., refused to admit the evidence, and ruled that the proposed evidence would not, if true, sustain the action, and that it was not competent for selectmen to enter names upon the list of voters after the opening of the meeting. Whereupon a verdict was taken for the defendants and the plaintiff excepted to the ruling.

E. Washburn *for the plaintiff.*

B. F. Thomas and G. Swan *for the defendants.*

Cushing, J.: This record presents but one question for our determination, namely, whether the court below ruled correctly in saying it was not competent for selectmen to admit names on the voting list after the opening of the meeting, that is, pending the election.

It is a question of the true construction of the provisions of the Rev. Sts., c. 3 & 4, and of the statute of 1839, c. 42, and especially the following paragraphs:

"The selectmen shall be in session, at some convenient place, for a reasonable time, within forty-eight hours next preceding all meetings for the elections of any of the officers aforesaid, for the purpose of receiving evidence of the qualifications of persons, claiming a right to vote in such elections, and of correcting the lists of voters; and such session shall be holden for one hour at least, on the day of such election, and before the opening of the meeting.

"In any town, where the number of qualified voters shall exceed one thousand, such session of the selectmen shall be holden on the day immediately preceding the meeting, and, for as much longer time, previous to said day, as the selectmen shall judge necessary for the purpose aforesaid." *

We agree at once that the statute does not make it the duty of the selectmen of a town to hold a selectmen's meeting, for the purpose of receiving evidence of the qualifications of voters, after the opening of the polls for the given election. Nor does the reason of the thing allow us to come to any other conclusion. After the voting has commenced, the selectmen are sufficiently occupied with their specific duty of the time, as presiding officers at the election and canvassers of the votes.

* This statute has since been repealed. See Pub. Sts., ch. 6, §§ 23, 24, 27.

Of course, it cannot be the right of any person to demand of the selectmen then to hold a meeting for the purpose of correcting the voting lists in his favor. He might have applied at the time which the statute points out, that is, before the commencement of the town meeting.

The conclusion implies, and the argument of convenience goes the length of showing, that it is not the right of the selectmen, after the opening of the town meeting, to hold a regular judicial meeting of their own for the general purpose of hearing and determining applications for the correction of the poll lists.

These opinions are confirmed by the reasoning of the court in the case of *Capen* v. *Foster*, 12 Pick. 492, and are not contradicted by anything in the subsequent cases of *Gates* v. *Neal*, 23 Pick. 308, and *Blanchard* v. *Stearns*, 5 Met. 302.

But we have heretofore decided that selectmen have authority, even after the opening of the town meeting, to strike from the list of voters the name of a person, who is not a legal voter. *Humphrey* v. *Kingman*, 5 Met. 162. And we have also decided that selectmen may add a name after the close of their stated meeting for the correction of the lists, though in anticipation of the town meeting. *Bacon* v. *Benchley*, 2 Cush. 100. We feel constrained to think that they have the power to do this, that is, to correct manifest error which may come to their knowledge, either by expunging a name or adding one, as justice may require, even after the opening of the town meeting.

While, therefore, we think it is not competent for the selectmen to hold a regular meeting for the purpose of correcting the lists after the opening of the town meeting, yet we are unable to see anything in the statute which renders it incompetent for them, on their official responsibility, to admit a name after that time; their action in the premises, in such a contingency, being limited by the exigency of subordination to their paramount duty as the presiding officers of the meeting.

We speak of course in regard to towns only, without going into consideration here, of what the law may be in this respect, in the very different case of cities, where, as they are organized in this Commonwealth, the municipal officers, whose duty it is to correct the voting lists, are not inspectors of the election.

Upon this view of the subject, a new trial is granted, to take place in this court.

Exceptions sustained.

JOHN H. HARRIS *v.* GRANVILLE WHITCOMB AND OTHERS.

4 GRAY, 433 (1855).

In an action against selectmen for refusing to receive the vote of an inhabitant of the town, parol evidence that the plaintiff's name was on the voting list is inadmissible without first giving notice to produce the list.

The fact that a person's name is on the voting list when the meeting is opened and the voting commences is *prima facie* evidence of his right to vote.

The remedy of one whose name is erased from the voting list by the selectmen before the voting commences, and whose vote, when offered, is refused by them, is an action against them for erasing his name, and not an action for refusing his vote.

Action of tort against the three selectmen of Boxborough. Writ dated November 9, 1852. The plaintiff in his declaration alleged "that he was a citizen of Boxborough in said county, and was by law entitled to vote for electors of president and vice-president of the United States in said Boxborough; that the defendants were the selectmen of said Boxborough, legally chosen and qualified, and bound by law to receive the vote of said plaintiff for said electors; that the said plaintiff, on the day of the presidential election in November last, his name being duly entered on the check list in said Boxborough, offered and tendered to said defendants his vote, according to law, and that the defendants refused to receive the same wrongfully and knowingly."

At the trial at April term 1854, before *Metcalf*, J., a witness, called by the plaintiff, testified that he was a distributor of envelopes for votes at said meeting; (which was held on the 1st of November, 1852); that, just before the voting began, he saw Taylor, the chairman of the selectmen, draw a pencil across the plaintiff's name on the two lists of voters which the selectmen had, one for their own use, and the other for the use of the distributors; that the plaintiff's name was on the several lists of voters which were posted up about the town before the meeting; and that he did not know what became of any of the lists. The defendants objected to this parol testimony, because notice had not been given to them to produce either of the lists, and because no evidence had been introduced to show that they were lost. But the objection was overruled.

The plaintiff introduced evidence tending to show that he resided in the town of Boxborough for six months next preceding the time of voting, and had paid within two years a county tax assessed upon him in that town; that he offered his vote to the selectmen at the meeting, and at the proper time, and claimed a right to vote;

that one of the distributors of envelopes interposed, and inquired of the selectmen if they should refuse the plaintiff's vote, and that Taylor, the chairman, answered: "Yes, if his name has been erased from the list;" that the plaintiff again offered his vote, and claimed the right of putting it into the ballot box; that the selectmen then consulted together, and Whitcomb, one of the defendants, said: "If there was no other ground for refusing his vote, he is a fugitive slave, and that would be sufficient;" that Taylor, the chairman, then said that the plaintiff was not a citizen of Boxborough, and his vote was refused. It did not appear that the third defendant did or said anything about the plaintiff's voting, but it appeared that he was present during this consultation and when the remark of the chairman was made.

The defendants moved the court to nonsuit the plaintiff, "1st, Because the evidence did not support the declaration; 2d, Because the plaintiff offered no other evidence, besides that herein reported, of his qualifications as a voter; 3d, That the assertion of Whitcomb, that the plaintiff was a fugitive slave, threw upon the plaintiff the burden of showing that he was not such fugitive; 4th, That there was no evidence against the defendants other than Taylor and Whitcomb." But the judge refused to advise a nonsuit, and the case went to the jury, who found a verdict for the plaintiff against the three defendants.

The defendants alleged exceptions, which were argued and decided at October term 1854.

B. F. Butler *for the defendants.*

G. F. Farley and J. Q. A. Griffin *for the plaintiff.*

Shaw, C. J: The court are of opinion that the voting list used at the election was an official document; that, in theory, it is in the custody of the town clerk, as the keeper of the records, documents, official files and papers of the town, and should be regarded as an important document, and ought to be certified, or otherwise authenticated, and recorded, or filed and preserved, for the security, as well of the voters, as of the selectmen and other officers. Taking this view, we think the voting list is the primary and regular evidence that any one's name is or is not on the list, and essential to the proof that a party has been admitted or rejected by the selectmen, as judges of the qualifications of electors. Then, according to the general rule on the subject, before using secondary evidence, notice to produce, or a *subpœna duces tecum*, must be issued, either to the town clerk, the selectmen for the time being, or the person who has the keeping of the muniments of title and other official papers.

If the original document is produced and authenticated as the voting-list, we think it is the conclusive evidence upon the question whether a person was admitted as a qualified voter at such meeting or not, and that parol proof or other secondary evidence would not be admissible to control it. As the parol evidence was admitted in the present case, without notice to produce the voting-list, against the objection of the defendants, we think there must be a new trial.

But in reference to the facts of the present case, it seems proper to add, that if, when the meeting is opened and the voting commences, the name of a person stands on the list, as that of one qualified and entitled to vote, he has *prima facie* a right to vote, and has no occasion then to offer proof of his title; but the selectmen may still strike off his name and reject his vote, if they can prove that he was not entitled to vote, or if they are prepared to show that he has not paid a tax within two years, or any other decisive fact of the like kind. *Humphrey* v. *Kingman*, 5 Met. 168.

If the party's name is not on the list, he must seasonably apply to the selectmen and offer proof of his right, and require his name to be placed on the list; and proof of such proceeding is necessary to maintain his action. *Blanchard* v. *Stearns*, 5 Met. 298; *Waite* v. *Woodward*, 10 Cush. 143.

As to the form of declaring, we think that where the name of a person is placed on the list, and so remains to the commencement of the meeting, and the selectmen then, on their responsibility, strike off the name of such person, and he brings an action against the selectmen on the ground of his vote being refused, when he had a right to vote, the gravamen of the case will be the refusal to receive his vote, and not the refusal to place his name on the list.

New trial ordered.

Upon the new trial at April term 1855, the plaintiff introduced evidence tending to show that the defendants erased his name from the list of voters at a meeting of the selectmen held just before the town meeting; that his name was on the lists of voters posted up in public places in the town before the election; that he offered his vote at the election, but the defendants refused to receive it, his name not being then borne on that list.

The plaintiff did not, at the election, or at any other time, offer any evidence to the defendants, of his having the legal qualifications of a voter in the town; nor did he request that his name should be inserted on the list of voters; but he tendered his vote, which was refused.

Upon this evidence, the defendants contended that they could not be held liable for refusing to receive the plaintiff's vote at said election, because, by law, the defendants had no right to receive the vote of any person whose name was not borne on the voters' list at the election; and it appearing that the plaintiff's name was erased from the list before the election took place, and before the meeting was opened, that this action could not be maintained; but the plaintiff's remedy was by another action, charging the defendants with wrongfully erasing his name from the list. *Bigelow*, J., nonsuited the plaintiff; and the nonsuit was confirmed at this term by the full court.

CHARLES J. HOLMES *v.* CHESTER W. GREENE AND OTHERS.

7 GRAY, 299 (1856).

A citizen of Massachusetts, removing with his family to another State, and retaining no dwelling-place in Massachusetts, though retaining his place of business here, and intending to retain his domicile here, and to return at some future indefinite period of time, has no domicile in Massachusetts.

Action of tort against the selectmen of Fall River for 1853, for refusing to receive the plaintiff's vote at the annual election for State officers in November of that year. Writ dated May 29, 1854.

At the trial, the defendants admitted that the plaintiff had all the legal qualifications of a voter, except a domicile in Fall River, and that was the only question submitted to the jury by *Bigelow*, J., who reserved for the consideration of the full court the question whether a verdict for the plaintiff could be supported upon the following evidence: —

The plaintiff had been a resident and voter in Fall River for ten years prior to the 6th of May, 1853, and on that day removed with his family from Fall River, across the line of the State, into the town of Tiverton in the State of Rhode Island, a short distance from his former residence, and there continued to reside until June, 1854, when he returned with his family to Fall River, where he has since resided; and during the whole time his office and place of business continued in Fall River. At the time of his removal to Tiverton, the house in which he had been living,

had been sold by the owner to one who wished to occupy it himself; it was somewhat difficult to obtain good tenements in Fall River for families of the number, ages and station in life of the plaintiff's; and the plaintiff made unsuccessful efforts to find a house, before removing to Tiverton. On his removal to Tiverton, he gave notice to the selectmen of Fall River, and to the selectmen of Tiverton, that he was about to remove to Tiverton for a temporary purpose, and intended to retain his domicile in Fall River.

At the meeting in Fall River in November, 1853, he requested the defendants to restore his name to the list of voters; furnished them with satisfactory evidence of his legal qualifications as a voter in all respects except residence; and referred them to legal authorities upon the question of his right of suffrage, which the defendants thought did not support his claim.

J. S. Brayton *for the defendants.*

C. I. Reed, *for the plaintiff*, cited *Sears* v. *Boston*, 1 Met. 250; *Blanchard* v. *Stearns*, 5 Met. 298; *Harvard College* v. *Gore*, 5 Pick. 370.

Bigelow, J.: It was conceded, at the trial of this cause, that the same evidence which was submitted to the jury, was offered by the plaintiff to the defendants, acting as selectmen of the town of Fall River, at the time he applied to them to have his name placed on the list of voters in November, 1853. The case was therefore tried according to the rule laid down in *Blanchard* v. *Stearns*, 5 Met. 298. The only question which now arises upon this proof is, whether it sustains the claim of the plaintiff, that his legal domicile was in Fall River in the autumn of 1853, and that he had a right to vote there in the annual election of that year. We think it very clear that it does not. This case differs from any other which has heretofore come before this court, involving a question of domicile. Six months before the time when the plaintiff claimed a right to vote in Fall River, he had removed thence with his family and all his household goods to the town of Tiverton, and there hired a house, in which he lived. All the outward *indicia* of inhabitancy pointed to Tiverton as his place of residence. The whole case of the plaintiff, therefore, rested on the fact that, at the time of his removal he declared his intention to be to remain in Tiverton only temporarily, and to return to and retain his habitancy in Fall River. If this evidence be sufficient to sustain a claim of domicile, then it must follow that a mere naked declaration of intent to reside in a city or town from which a party has removed, without any proof of other facts with which such intent can be connected,

is adequate proof of inhabitancy, under the Constitution and laws of this Commonwealth.

This cannot be so. It is true that, in cases where the domicile of a party is in issue, evidence of his intent may have an important and decisive bearing on the question, but it must be in connection with other facts, to which the intent of the party gives efficacy and significance. Such is the case where a person has two dwelling-houses in different towns, in each of which he lives with his family an equal portion of the year. *Harvard College* v. *Gore*, 5 Pick. 370. So, too, where a citizen leaves the country to be absent abroad for purposes of business or pleasure for an indefinite period, still retaining his house and furniture in the place of his previous residence. *Sears* v. *Boston*, 1 Met. 250. But no case can be found where the domicile of a party has been made to depend on a bald intent, unaided by other proof. The *factum* and the *animus* must concur in order to establish a domicile. *Harvard College* v. *Gore*, 5 Pick. 370. The latter may be inferred from proof of the former. But evidence of a mere intent cannot establish the fact of domicile.

New trial ordered.

OPINION OF THE JUSTICES TO HOUSE OF REPRESENTATIVES.

10 GRAY, 613 (1858).

Chief Justice SHAW, and Associate Justices DEWEY, METCALF, BIGELOW, THOMAS and MERRICK.

Under the twenty-first article of amendment of the Constitution, the mayor and aldermen of Boston, in the county of Suffolk, and the county commissioners in other counties, are empowered to apportion the number of representatives assigned to the county among the representative districts formed by them, under said article, as well as to form the districts; and their doings and returns in the premises are conclusive and cannot be revised by the house of representatives in judging of the returns of elections and qualifications of its members.

The undersigned, justices of the supreme judicial court, have received a communication from the honorable the house of representatives, requesting their opinion upon the following questions, to wit: —

"First. Does the twenty-first article of amendment of the Con-

stitution confer on the commissioners named in that article, or in the county of Suffolk, on the mayor and aldermen of the city of Boston, any power to apportion the number of representatives to which the county is entitled, among the representative districts formed by them pursuant to that article? Or, in other words, does the power of the said commissioners, or mayor and aldermen, extend to the assignment of the number of representatives to which the districts formed by them are entitled, as well as to the formation of such districts?

"Second. When the said commissioners or mayor and aldermen have divided the county into representative districts, and apportioned the representatives to which the county is entitled among such districts, is it competent for the house of representatives, in judging of the returns of elections and qualifications of its own members, to revise their said proceedings in whole or in part, and to change the number of representatives so apportioned to any district or districts, if satisfied that such number is different from the number to which such district or districts would be entitled, if determined exclusively by the enumeration of legal voters, taken pursuant to said twenty-first article of amendment?"

Whereupon the undersigned, having taken the said questions into consideration, do thereupon ask leave respectfully to submit the following opinion: —

Upon the first question we are of opinion, that the twenty-first article of amendment of the Constitution, which took effect and went into operation in 1857, did confer full power on the commissioners named in that article, in all the counties except Suffolk, and in the county of Suffolk on the mayor and aldermen of the city of Boston, to apportion the number of representatives to which such county might, by the act of legislation therein provided for, be entitled to among the representative districts to be formed by them pursuant to said article; and that the power of the said commissioners in the several counties, and of said mayor and aldermen in Suffolk, did extend to the assignment of the number of representatives to which each of the districts to be formed by them would be entitled, as well as to the formation of such districts.

We are of opinion, founded on all the terms and provisions of the 21st article of amendment, as well as on the objects and purposes proposed to be accomplished by this change in an important part of the Constitution, that it was intended to vest in the county commissioners for the several counties, and in the mayor and aldermen of the city of Boston, unless special commissioners

should first be elected for that purpose, in the manner directed by that article for the exercise of the same power, which was not done, not only to form the several towns in each county and wards of each city in their respective counties into local districts, to be designated by metes and bounds, and further designated by a specific enumeration, not dividing any town or any ward of a city, and make return thereof, and therein to specify and declare the number of representatives, which each of said districts shall have a right to send to the general court, to constitute the house of representatives, the number thus assigned to each district, and thus declared and returned not to be less than one nor more than three in each district. And we may add that, in our own opinion, these boards of commissioners, — no special commissioners having been elected for the purpose, — would not have fully executed the power confided to them by this constitutional provision, nor fully have performed the duty required of them, if they had not thus assigned, designated and specified, and declared in their returns the number of representatives to which each district should be entitled, until the time for a new formation of a district, and apportionment of representatives.

Perhaps it may not be easy, in a short space, to state all the reasons on which this opinion is placed, but we will mention some of the most prominent.

This amendment contemplated and provided for carrying into effect, one of the most important changes which could be made in the Constitution of the Commonwealth. Nothing can more deeply concern the freedom, stability, the harmony and success of a representative republican government, nothing more directly affect the political and civil rights of all its members and subjects, than the manner in which the popular branch of its legislative department is constituted. We do not here speak of it in its character as a true representative of the interests, the intelligence and the will of the whole, and all the parts of the constituent body, but as a practical scheme of measures for the accomplishment of a great object. It obviously required a system of plain, simple and intelligible rules, easy to be understood, and to be carried practically into execution by hundreds and thousands of town and city officers of all degrees of intelligence. And this system was designed to supersede and replace the long practice of electing representatives through the medium of town organizations, and the agency of municipal officers, a practice which had grown so familiar from experience and habit, that it was almost impossible that any mistake could be made. These considerations, it appears to us, must have been deeply impressed on the

minds of the legislatures and people of the Commonwealth, in proposing and adopting this amendment, and must therefore be kept steadily in view in putting a construction upon it, both in its general scope and in all its details.

The great object to be attained manifestly was, to reduce great[illegible] the number of representatives, and, in conformity with the theo[illegible] of representation, to secure as nearly as possible an equality [illegible] the ratio of representatives and legal voters throughout the Commo[illegible] wealth. This object might be accomplished in any one of vario[illegible] modes. The amendment itself might have divided the State int[illegible] districts, and have apportioned the representatives among them[illegible] or it might have authorized the legislature to do the same thing [illegible] or it might authorize the legislature to do it in part, and provid[illegible] that the details should be completed by another body specially [illegible] designated and empowered for that purpose. This was the ex[illegible] pedient actually adopted. A census of the number of legal voters [illegible] in each city and town being first made, as provided for in the [illegible] amendment, the legislature were required to apportion the two [illegible] hundred and forty representatives among the several counties of [illegible] the State. Then, unless a law should be passed providing for the [illegible] election of a board of special commissioners in each county, and [illegible] no such law was passed, and no such special commissioners were [illegible] elected, the mayor and aldermen of the city of Boston, the county [illegible] commissioners of other counties than Suffolk should, on the first [illegible] Tuesday of August, after each assignment of representatives to each county, assemble at the shire town of their respective counties, and proceed as soon as may be to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the number of legal voters in the several districts of each county.

Such was the system provided. The legislature, had they seen fit, might have postponed making the apportionment among the counties, and in the meantime have provided by law for the election of special commissioners, which would have extended as well to Suffolk as to the other counties; had they done so, the powers of such special commissioners would have been precisely the same in all the counties. The legislature passed no such law; on the contrary, they made the apportionment among the counties which, by the amendment, the secretary of the Commonwealth was required forthwith to certify to the board authorized to divide each county into representative districts. It became, therefore, the duty of the mayor and aldermen of Boston to proceed and perform the same duties for the county of Suffolk, which special

mmissioners would have been authorized and required to do, d they been elected as provided in this amendment.

These boards are to divide the respective counties into repre- ntative districts, so as to apportion, as nearly as may be, ac- rding to their relative number of legal voters; but this is to be ne under several absolute and inflexible conditions prescribed the Constitution, by which they are bound.

1. No town and no ward of any city can be divided in forming district.

2. No town or ward of a city can be united with any other wn or ward of a city to form a district, unless they are contig- us to each other.

3. No district can be formed, embracing so large a number of ters as, according to the ratio for such county, would enable it send more than three representatives.

Subject to these conditions, having a regard to the relative mber of voters in each town and city ward, so far as it can be d, consistently with these fixed conditions, they are to form presentative districts with such number of voters as to enable m to choose *one*, *two* or *three* representatives. To illustrate s: They must first ascertain the ratio between the voters and representatives, by taking the whole number of voters in the unty, and dividing that number by the number of representa- es assigned to it. This must, almost of necessity, certainly cording to the doctrine of chances, leave a fraction for which may, in some cases, be necessary to provide. Having estab- hed the ratio for one, it is for the board to form districts hav- within them numbers, as near as may be, in reference to ier conditions, to the ratio thus found, to choose one repre- ntative, or twice that number to choose two, or three times that mber to choose three. This is clearly within their express thority. They are bound to have this consideration in their n mind, in forming, describing and numbering each district, ether it is a district for one, two or three; this they are bound do, by the regard they are bound to have to equality in the io between voters and representatives. They are bound to m the district with a view to the number of the representatives which such district shall be entitled, whether they are bound to press it in their return or not.

In many counties there may be a great variety of circumstances ling for the exercise of judgment in the formation of districts. e county of Middlesex has, we believe, fifty-two towns and ies — forty-nine towns and three cities. Suppose each city has wards, here are sixty-seven organized bodies, with some very

large towns and some very small ones, to be classed and grouped together into districts, so as, in the whole, to elect thirty-eight representatives. We will not undertake to imagine the great variety of complex circumstances under which, according to the Constitution, this duty is to be done. Without putting particular cases by way of illustration, which might be greatly extended, it seems that equality between voters and representatives cannot be reached, and, indeed, was not contemplated by the amendment, except that, "as nearly as may be," approximation to this equality, is to be sought by those whose duty it is to form the districts. In forming districts with a view to such approximation, they must take into consideration,

1st The absolute number of voters in each town and city ward of the county, as fixed by the census for the occasion.

2d. Whether that number is over or under the ratio of voters to a representative for that county, as first found, and how nearly it approaches that ratio for one, or double that number for two, or treble that ratio for three representatives.

3d. Whether any one town or city ward, with reference to that ratio, can be constituted one district approximating nearly, and how nearly, to the ratio for sending one or more, or whether any such town or city ward can be so combined with any other one or more towns or city wards, so that the aggregate of voters in the towns or wards so combined, shall approach nearly, and how nearly, to such ratio, or its duplicate or triplicate.

Thus it will be perceived that the great principle of equality of representation, or the nearest practicable approximation to it, which lies at the foundation of this whole constitutional provision, is to govern, subject to the inflexible restrictions, not only in apportioning the representatives to the district, but in the mode of forming the districts so as to bring that approximation as near as may be to the true equality. They have full authority to form these districts, with reference to the election of one, two or three representatives, and were bound to be governed by the great principle of equality in doing it, conformably to the tenor of the constitutional amendment under which they acted. Here, then, there was abundant room for the exercise of reason and judgment in forming the districts; they must have formed them with the view to their right to elect one, two or three representatives, and it would seem to be necessarily incident to the completion of the work, that they should declare and return the number intended that each district should be entitled to elect.

Thus far we have drawn our illustrations respecting the powers of the commissioners, and mayor and aldermen, from the cases

which may be supposed to arise in other counties than Suffolk. The circumstances indeed, on which the commissioners were to act, might be considerably different, inasmuch as the city at no distant period had been divided into twelve wards, then nearly equal, for the purposes of representation in the city council. There would, therefore, be likely to be fewer cases of complex and extraordinary facts, calling for the exercise of judgment, though there had come to be large discrepancies between the numbers of inhabitants, and still greater of legal voters, in the respective wards. But the same powers are given in the same terms to the mayor and aldermen in Suffolk and the commissioners in other counties, and no purpose is shown in the amendment, to invest them with other or different powers.

Again, this constitutional amendment not only vested in the mayor and aldermen the power to form districts in the county of Suffolk after the census and apportionment of 1857, but also after that to be made in 1865, and every tenth year after, to all future time. There may or may not be a new arrangement of the city into wards, by increasing or diminishing the number of wards, or by an entirely new division. If no such new arrangement of wards is made before 1865, or the next or some succeeding decennial term, judging from experience, there will probably be a much greater disparity in the number of legal voters than at present. Some one or more will perhaps have so increased, that when the ratio for the county is established, they may be found to have over four times that number; but by the inflexible rule it can have but three representatives. Some one may have so far decreased as to fall short of the ratio for one. But by the same inflexible rule, it cannot be disfranchised. It may not be contiguous to any other ward, with which it may be united, without making the aggegate number of voters more than enough by the ratio for three; it must therefore, however small, be constituted a district to choose one.

Here, then, would be room and a great demand for the exercise of reason and judgment in determining, among various methods placed within their reach, how the districts should be formed, and a determination, somewhat judicial in its character, how many representatives each district is entitled to elect.

But, at the time of the adoption of this amendment, it could not be known that such questions would not arise in Suffolk as well as in other counties; and the power was given to the commissioners of all counties alike, to meet all cases to which it could extend at the first or subsequent establishment of districts.

The makers of this constitutional amendment, not having formed the State into districts for the election of representatives,

not having vested the power in the legislature to form the counties into districts, but only to apportion the two hundred and forty representatives among the counties, must have felt the necessity of providing a body, competent in their view to perform this duty fully and completely. They must have understood that, in the performance of this duty, the questions herein before suggested, and many others not capable of being solved by mere computation, must arise and must be determined by sound judgment. The question then recurs, looking at the exact terms of the amendment and its obvious purposes, to what body was this duty intrusted and what powers were vested in them to enable them to perform it?

We can have no doubt that this whole duty was confided to the county commissioners for other counties, and to the mayor and aldermen of Boston for the county of Suffolk, there being no county commissioners in this county. The terms, though not clear and explicit, do, in our opinion, import this. They are to divide their respective counties into representative districts, so as to apportion representation equally, as near as may be, according to the number of voters in each district. There is a slight obscurity in the sentence, which would be removed by a slight change in the words. If there were a comma after "voters," and the word "in" were "to," it would be somewhat more free from obscurity. But we think the meaning is, "so as to apportion," or "so that they may apportion" "in" or "to" the districts. But this is confirmed by the residue of the provision prescribing the duty of the commissioners.

The districts in each county shall be numbered by the board, and a description of each, so numbered, with the number of legal voters in such county, shall be returned by the board to the secretary of the Commonwealth, the county treasurer of each county, and the clerk of every town in each district, to be filed and kept in their respective offices.

Here, then, is the purpose for which these returns are to be made: not for revision or correction, not for acceptance or rejection, or recommitment, but for preservation and information; a final act determining the rights of all parties concerned, and, in effect standing as part of the Constitution during the decennial period.

Again; it is not expressly required by the provision, that the board shall state the whole number of the representatives which they are required to apportion to the whole county; whereas by returning the number apportioned to each district, the aggregate of the numbers of representatives assigned to each district will

t they have rightly apportioned the whole number assigned
unty; and this leads to a strong conclusion, that such an
ıment to each district was to be made and returned by
ıissioners.
en should the commissioners return the whole number of
:atives apportioned to the county, and that they had
; into a given number of districts, stating the number of
ers in each, without specifying the number of representa-
each district, the work would be very imperfect. For
in Suffolk there are two cities, Boston and Chelsea, and
ıs, North Chelsea and Winthrop. Whether Chelsea is
into wards or not, we do not know; probably it is.
the mayor and aldermen had returned that they had
ıed twenty-eight, the number of representatives assigned
unty by the legislature, and had formed it into thirteen
giving the number of voters in each, without more; it
: extremely difficult, if not impossible, to determine by
:ulation, what number each would be entitled to choose,
nt of the fractions, larger or smaller, by which some dis-
uld fall short, and some exceed the average ratio. But if
ossible to ascertain the number of representatives which
:rict would be entitled to elect, it must be through the
of a complex and difficult calculation, to be made by the
.nd voters at every election; whereas the article plainly
a simple, recorded document, open to the inspection of
ıg in terms the number which each district may elect, for
rnment of all city, town and ward officers, in issuing
, calling and holding meetings, and for receiving and
ş votes, and also for the information and security of

ıestion then recurs whether the doings and returns made
ıbly to the article of amendment are to be deemed con-

s a question of power. The power, whatever was its
ras conferred when the amendment was adopted; it was
l alike on the commissioners and on the mayor and
. in their respective counties; it was not limited to the
things as it then existed, but was intended to adapt itself
ch changes and states of things as might arise at any
ne. As the exigency of the case, namely the regular and
ous action of the government, required that the powers of
lies, appointed in behalf of the people to establish repre-
districts, should be large and adequate to the occasion,
: them to decide all questions incident to the establish-

ment of such districts within the limits prescribed by the article itself. As such exigency required that the execution of these powers should be definitive (and no mode is suggested for the revision of the doings of the commissioners), the conclusion is that the decisions of the various questions before them, made by the bodies thus empowered as expressed in their final action and returns, must be taken to be decisions made by a body of competent jurisdiction, duly authorized by the Constitution, and are therefore conclusive.

In answer to the second question, the undersigned are of opinion that it would not be competent for the house of representatives, in the case supposed, in judging of the returns, elections and qualifications of its own members, to revise the proceedings of the county commissioners and mayor and aldermen, in whole or in part, and to change the number of representatives, by them apportioned to any district, if satisfied that such number is different from the number to which such district would be entitled, if determined exclusively by the enumeration of legal voters, taken pursuant to said twenty-first article of amendment.

The house of representatives are, by the Constitution, final judges of the returns, elections, and qualifications of their own members. Their duty is, we think, rather to judge of the rights of persons returned as members, and claiming to be members, than of the rights of districts or constituencies, although the latter may sometimes be incidentally involved. For instance, in the case suggested by the question, suppose three members are returned by a district to which three were assigned, and suppose another, to which two only were assigned, claiming a right to send three, had elected and returned three; the whole six could not hold seats, and the house must decide between them. But in coming to that decision, they must, in our opinion, look exclusively to the act done by the commissioners pursuant to the Constitution by which the districts were formed, and the number of representatives assigned to each. Were it otherwise, it appears to us that great confusion would follow. If the house could decide between two particular districts, coming before them by petition or otherwise, each claiming a superior right to the other, then any and all the other thirteen or fourteen districts in Suffolk might come before the house in the same manner, to have their rights determined. So of the county of Middlesex, with its forty-nine towns and three cities to choose thirty-eight representatives; it may be divided into any number of districts not less than thirteen nor more than thirty-eight. Should any error be discovered in combining contiguous towns and city wards into districts, or in the

computation of the numbers of voters necessary to the apportionment of representatives among them, the whole might be revised, and many changes of representatives made, and yet such act of the house could only extend to the elections for one year.

Now it is obvious that if the Constitution had itself framed the districts, and apportioned the representatives, it must be taken by the house to be conclusive, although errors of computation might afterwards be discovered in the application of the principle of distribution adopted by its framers. Now when a part of this duty was ordered to be done, and returned by other public bodies, and recorded in various public offices for the general and authoritative information of all officers and voters, it was an act done by the delegated authority of the Constitution, and ought to have the same practical effect as if done in terms by the framers of it.

For the reasons given in answer to the first question, therefore, we are of opinion that the house of representatives, in exercising the right vested in them by the Constitution respecting the election of members, are bound to take the formation of districts and the apportionment of representatives to each district, as made and returned by the county commissioners, and the mayor and aldermen of Boston in their respective counties, to be conclusive. If it shall be asked what shall be done if one of these apportionments and returns shall be discovered to be erroneous, our answer is that the Constitution has provided no power competent to inquire into and correct any such error. Some error may occur in all human transactions, and therefore even those who may discover or think they have discovered an error, may themselves have fallen into error in conducting their inquiries and making their computations. But the final power must rest somewhere, and the exigencies of government will not admit of its waiting in its movements until all possible errors in its constitution and organization are removed.

All public officers who are charged with the performance of public duties, and who may be guilty of fraudulent, wilful and corrupt conduct in the discharge of them, are liable to prosecution and punishment therefor, by impeachment or indictment; but even punishment for their misdeeds may not necessarily correct them, though it may afford an additional security to the public against their perpetration.

Boston, March 11, 1858.

EDWIN A. LUCE *v.* THEODORE G. MAYHEW AND OTHERS.

13 GRAY, 83 (1859).

A certificate of the number of votes given for county commissioners at a town meeting duly held for that purpose, and of the result thereby appearing, signed "Attest, J. S.," without showing that it is a copy of the town record, or that J. S. is town clerk, is not a return which the board of examiners are authorized to receive, or will be required by mandamus to consider in determining who is elected county commissioner.

HOAR J.: This case arises upon an alternative writ of *mandamus*, issued upon the petition of Edwin A. Luce of Tisbury, in which the petitioner alleges that he was duly elected a county commissioner for the county of Dukes County, at the election in November, 1858; that the board of examiners for that county met according to the requirements of law; that by the returns made to said examiners, it appeared that the petitioner had received the highest number of votes at said election; that it was thereupon their duty to declare the petitioner to be duly elected to said office, and forthwith to give him a written notice to that effect, in due form of law; that they have neglected and refused to declare him duly elected as such commissioner, and to give him written notice of his election; but, on the contrary, have given a certificate of election to said office to William S. Vincent, who was not legally elected thereto.

The writ was served upon the examiners, who appeared at May term 1859 in Barnstable, and showed cause why a peremptory *mandamus* should not issue; and notice of the pendency of these proceedings was given, by order of the court, to William S. Vincent, the incumbent of the office.

At the hearing it was proved and admitted, that when the board of examiners met to examine the returns of votes transmitted to them, papers purporting to be returns of votes from each of the three towns in the county of Dukes County were received by them; that they rejected the returns from the towns of Tisbury and Chilmark, as not being made in conformity with the requirements of law; that William S. Vincent had a large majority of the votes given in the town of Edgartown, from which town a correct return was received, and that he was thereupon declared duly elected, and a certificate of his election was given to him.

It also appeared that if the returns from Tisbury and Chilmark had both been received and counted, the petitioner would have

been entitled to the certificate of election; but that if either of them were rejected, the result of the election would be the same as if the vote of Edgartown alone were counted; the plurality for Luce in either not being in itself sufficient to counterbalance the plurality for Vincent in Edgartown.

The question then arises whether the returns from either town were rightly rejected by the board of examiners. The only return received by them from the town of Chilmark was the following:

"At a legal meeting of the inhabitants of the town of Chilmark, in Dukes County and Commonwealth of Massachusetts, qualified to vote in elections, holden on the second day of November, in the year eighteen hundred and fifty-eight, for the purpose of voting for a county commissioner for said county, the votes given in were sorted, counted, recorded, and public declaration thereof made, and were for the following persons:

Whole number of ballots, ...		44
Edwin A. Luce, ...		31
William L. Vincent, ...		13
	TRISTRAM MAYHEW, SMITH MAYHEW, MOSES C. VINCENT,	*Selectmen of Chilmark.*

Attest: JAS. N. TILTON.

Two objections are made to the validity of this return. 1, That it does not purport to be a copy of the town record; and 2, That it does not purport to be attested by any town clerk.

The statutes from which the powers and duties of the board of examiners are derived are the Rev. Sts. c. 14, §§ 17, 18, 19, 38; Sts. 1854, c. 77; 1855, c. 3.*

It is obvious from an examination of these statutes that the duties of the board of examiners are simply ministerial. By § 18 of c. 14 of the Rev. Sts., they are required to meet at a time specified, and "to examine the returns of votes transmitted to them, and, if any person, shall be found to have a majority of all the ballots," to give the person elected written notice of his election. By subsequent statutes the time of their meeting is changed, and a "plurality" of votes is substituted for a "majority." They are not made a judicial tribunal, nor authorized to decide upon the validity or the fact of the election, in any other mode, than by an examination of "the returns" made to them, according to law. They are not required or authorized to hear witnesses or weigh evidence. They have no power to send for persons or papers. If one result appears upon the returns, and another is the real truth of the case, they can only act upon

* Pub. Sts., ch. 7, §§ 48, 49.

the former. If they have done their duty, the remedy of the person actually elected to the office is not to be sought in a *mandamus*. This court has no power to direct public officers to do any more than their duty, or anything different from their duty.

The decision of the case must then depend upon the answer to be given to the question, whether the paper received from the town of Chilmark was a "return" such as the law prescribes, and which the board of examiners were required by law to examine and treat as a legal return. The court are of opinion that it was not. It does not purport to be a copy of a town record, but is a certificate, apparently original, of certain facts which it recites. It is not attested by any person describing himself, or in any way appearing upon the paper to be, the town clerk of Chilmark. The board of examiners had no official knowledge, and were not required to ascertain or know, that the person signing his name "Jas. N. Tilton" was in fact such town clerk. The "return" required by Rev. Sts. c. 14, § 17, is a copy of the town record, signed by the selectmen and attested by the town clerk. The board of examiners were not required by law to receive, examine, or treat as a return any paper which did not appear upon its face to be such a return. The respondents having therefore sustained the issue raised upon their answers, are entitled to a judgment for their costs.

Judgment for the respondents for costs.

Caleb Lombard *v.* Benjamin Oliver and others.

3 Allen, 1 (1861).

No action lies against the selectmen of a town for refusing to put upon the list of voters therein the name, and rejecting the vote, of one who was not a legal voter, although the proof produced by him to them was sufficient to establish, *prima facie*, his right to vote; and they may prove at the trial that in fact he was not a legal voter.

Tort against the selectmen of Wellfleet, for refusing to put the plaintiff's name upon the list of voters, and rejecting his vote, at several elections in that town.

At the trial in the superior court, the defendants offered evidence to prove that the plaintiff was not legally entitled to vote in Wellfleet, at the several times when his vote was refused by the defendants; but *Vose*, J., ruled that no facts in reference to his right to

vote could be proved, which were not laid before the defendants when he made his claim, or which were not then personally known to them. The jury returned a verdict for the plaintiff with $600 damages, and the defendants alleged exceptions.

Other facts and rulings in the case became immaterial.

H. A. SCUDDER *for the defendants.*

B. F. AND H. L. HALLETT, *for the plaintiff*, cited *Blanchard* v. *Stearns*, 5 Met 298; *Waite* v. *Woodward*, 10 Cush. 143; *Harris* v. *Whitcomb*, 4 Gray, 435; Rev. Sts. c. 3 § 9.

BIGELOW, C. J.: In the trial of this case, one of the issues which was presented by the pleadings seems to have been overlooked by the court.

The only question which appears to have been regarded as open before the jury was, whether the plaintiff, before offering his vote at the meetings of the inhabitants of the town alleged in the declaration, furnished the defendants sufficient evidence of his having the legal qualifications of a voter. It is true that the plaintiff, in order to maintain his action, was bound to assume the affirmative of this issue, and to prove it to the reasonable satisfaction of the jury, and if he established it, he would thereby make out a *prima facie* case, which, in the absence of controlling proof, would entitle him to a verdict. Rev. Sts. c. 3, § 9; Gen. Sts. c. 6, § 11; c. 7, § 10.* *Blanchard* v. *Stearns*, 5 Met. 298. But it is a mistake to suppose that this was the only question of fact which was open on the pleadings.

Another material issue was raised by the answer. The defendants alleged that the plaintiff, at the time he sought to have his name placed on the list and claimed the right to deposit his vote, was not in fact a legal voter in the town. In support of this averment in their answer, the defendants offered evidence which was rejected by the court. But a little attention to the nature of the action, and to the grievance of which the plaintiff complains will show that this allegation, if established by proof, is a perfect bar to the action. It is the legal right to vote which the plaintiff seeks by this suit to vindicate. It is for a violation of this right that he claims a compensation in damages. He alleges that it was by the wrongful acts and refusals of the defendants, in their capacity of selectmen of the town, that he was deprived of the privilege of exercising the elective franchise, to which he was entitled as a legal voter in the town. The gist of his action is not that the defendants refused to put his name on the list, or rejected his vote. These are immaterial averments, unless coupled with the

* Pub. Sts., ch. 7, § 10.

other and fundamental fact, that he was at the time a legal voter in the town.

If he did not possess the legal qualifications of a voter, then no wrong was done to him by the defendants for which he can maintain an action. On the contrary, if his name had been placed on the list and his vote had been received by the defendants, he would have thereby gained no right, but only obtained the means by which he might have deposited unlawful votes, and thereby subjected himself to indictment.

The misapprehension at the trial probably arose from an erroneous application of the provisions contained in Rev. Sts. c. 3, § 9, as explained and expounded in the case of *Blanchard* v. *Stearns*, *ubi supra*. That enactment followed substantially the provision embodied in the previous statute of 1822, c. 104, § 4. Previously to the passage of the latter statute, under the decisions of this court, selectmen were held liable to actions for refusing to receive the vote of a person legally qualified, although they acted according to their best judgment, without malice, and without being guilty of any negligence in the performance of their duty.

It is obvious that this rule of law would operate with great hardship on public officers, upon whom was imposed the difficult task of deciding suddenly, without opportunity for examination of facts, upon the qualifications of voters. The object of the provisions of the statutes above cited was to relieve in some degree, the harsh operation of this rule of law, by exempting selectmen from liability for omitting the name in the list of voters and for refusing the vote of any person, unless he should, before offering his vote, furnish them with sufficient evidence of his having the legal qualifications to entitle him to vote. It cannot be contended that these statutes were designed to confer any new right on the voter. On the contrary, they cast upon him a new burden. They compelled him to be ready with proof of his right to exercise the elective franchise, in order that he might offer it to the selectmen, and exempted them from liability in case of refusal to allow him to vote, unless the evidence should be found sufficient to show that such refusal was erroneous. But they gave him no new cause of action.

They did not entitle him to recover, if he was not a legal voter in the town, merely because he offered to the selectmen evidence which *prima facie* established his right to vote. If such was the effect of the statute, then it would follow that any person who, by producing false testimony before the selectmen, or by suppressing facts having a material bearing on the question, might make out before them an apparent right to vote, might also sustain an action

for the rejection of his vote, although it might be shown that in fact he was not at the time a legal voter in the town. There is nothing in the statutes to lead to such an absurd conclusion.

The truth is, that in actions of this nature two issues may be presented on which, if properly raised by the pleadings, it is the duty of the jury to pass. One is the question whether the plaintiff, at the time he claimed the right to vote, seasonably submitted to the selectmen sufficient evidence that he was possessed of the qualifications entitling him to vote. If he did, then this evidence would make out a *prima facie* case which would entitle him to a verdict in the absence of controlling proof. But it would be competent for the defendants to raise another issue, and to show, although he did offer evidence to them, which if it was true and embraced all the facts bearing on the question, would have entitled him to vote, that nevertheless this evidence was false, or that facts were suppressed or kept back, which proved that at the time he was not a legal voter in the town. If such evidence was offered, and it appeared to the satisfaction of the jury that the plaintiff had no legal right to vote at the time his vote was tendered and refused, then the plaintiff must fail in his action, because in such case, the defendants would have deprived him of no right and have done him no wrong by the refusal of his vote.

Inasmuch as the jury were precluded by the ruling of the court from considering one of the main issues raised at the trial, and as many of the incidental questions raised by the exceptions may become immaterial upon another trial, we do not deem it necessary at this time to express any opinion concerning them.

Exceptions sustained.

CALEB LOMBARD *v.* BENJAMIN OLIVER AND OTHERS.

7 ALLEN, 155 (1863).

In an action against the selectmen of a town for refusing to put the plaintiff's name upon the list of voters and rejecting his vote, the plantiff may prove his own statements relating to his residence, made to the selectmen before offering his vote, not under oath, for the purpose of furnishing to them evidence of his having the legal qualifications of a voter; and he may testify to his own intention in leaving the town for a prolonged absence, previously to the time of the acts complained of.

Tort against the selectmen of Wellfleet, for refusing to put the

plaintiff's name upon the list of voters, and rejecting his vote at several elections in that town.

At the second trial in the superior court, before *Russell*, J., after the decision reported in 3 Allen, 1, the plaintiff, for the purpose of showing that before offering his vote he furnished to the defendants sufficient evidence of his having the legal qualifications of a voter, was allowed to prove certain statements relating to his residence, made by him before the board of selectmen, not under oath.

To these the defendants objected, on the ground that statements not under oath were not competent testimony before them. It was not proved or claimed that they made any such objection at the time, or that they tendered an oath to the plaintiff.

It appeared that the plaintiff in 1857 went from Wellfleet to Roxbury, and that he passed the most of the time in the latter place down to the time of the acts complained of in 1859. The plaintiff was a witness, and his counsel asked him what his intention was in leaving Wellfleet; to this question the defendants objected, but the judge overruled the objection, and the plaintiff replied that he did not intend to remove from Wellfleet.

The jury returned a verdict for the plaintiff, with $800 damages, and the defendants alleged exceptions.

H. A. Scudder *for the defendants.*
G. Marston *for the plaintiff.*

Bigelow, C. J.: We cannot doubt that the testimony of the plaintiff concerning the statement made by him of his qualifications as a voter to the defendants, at the time he sought to have his name put upon the list of voters, was competent evidence and should have been admitted. He was bound to show, in order to maintain this action, that he had offered sufficient evidence to the defendants to authorize and require them to put his name on the list. *Blanchard* v. *Stearns*, 5 Met. 302. His own statement of facts bearing on the question of his residence in the town was a part of this evidence, which they could not properly overlook or disregard, in determining on his right to vote, unless there was good reason for disbelieving or rejecting it.

The proceedings before selectmen of towns, and mayors and aldermen of cities, under Rev. Sts., c. 3, §§ 6, 7 (Gen. Sts., c. 6, §§ 6, 7),* are not intended to have the formality and regularity of judicial proceedings. They are in their nature summary. Nor is it the design of the statute that the investigation should be conducted under a strict application of the rules of evidence at common law. This would be quite impraticable and would defeat the great object of the statute, which was to enable voters, by an

* Pub. Sts., ch. 6, §§ 23-25.

application to the selectmen during a brief interval before the holding of an election to cause their names to be put upon the list. Certainly it would work very great injustice, if the evidence of a voter's qualifications was offered and received by the selectmen without objection by them as to its form or nature, or without any requisition that it should be under the sanction of an oath; and at the same time that his claim should be rejected for a mere informality of proof, without any knowledge by him of the ground on which his right to vote was denied. Good faith and fair dealing would require that the voter should be informed of any defect in the form or mode of proof, if the selectmen intended to reject his claims on that ground, so that he might cure the irregularity or supply the deficiency. In the case before us it does not appear that any objection was made to the statements of the plaintiff at the time he made them to the selectmen.

He was not informed that they were incompetent, or that they would not be received and regarded unless made under oath. For aught that appears, he was left to suppose that the facts stated by him were supported by competent evidence. Under such circumstances, we are of opinion that the defendants were stopped from setting up, in subsequent proceedings against them, the objection that his statements must now be rejected as part of the evidence laid before them, because he was not a competent witness, or for the reason that he did not testify under the sanction of an oath.

We also think that, upon another and distinct ground, evidence of the statements made by the voter to the selectmen was competent on the trial of the issue in this action. It is provided by Rev. Sts., c. 3, § 8 (Gen. Sts., c. 6, § 10), that whoever gives a false name or a false answer to selectmen, when in session for the purpose of receiving evidence of the qualifications of persons claiming a right to vote, shall forfeit the sum of thirty dollars for each offence. This enactment affords a clear and direct implication that the statements of persons concerning their own qualifications as voters are not only competent evidence to be received by selectmen, but that it is not necessary that they should be made under oath.

The plaintiff was a competent witness on the trial of this action, under Gen. Sts., c. 131, § 14. The question of his intention in leaving the town for a prolonged absence was material in its bearing on the issue before the jury, and his own testimony that he did not thereby intend to change his domicile was clearly admissible. *Fisk* v. *Chester*, 8 Gray, 506; *Thacher* v. *Phinney*, 7 All. 146.

Exceptions overruled.

CASE OF SUPERVISORS OF ELECTION.

114 Mass. 247 (1873).

The St. of 1873, c. 376, § 1, directing the justices of this court to appoint supervisors of election, is unconstitutional and void.

Petition under St. 1873, c. 376, § 1, for the appointment of supervisors of election. The petition was signed by five legal voters of ward 3 in the city of Boston, and was in the following words: —

"To the honorable the justices of the supreme judicial court, holden at Boston, within and for the county of Suffolk.

"Respectfully represent the undersigned, being five legal voters of ward 3 in said city of Boston, that they desire to have the election of state and county officers, to be held in said ward on the fourth day of November next, guarded and scrutinized as provided in the 376th chapter of the acts of 1873, and they respectfully petition that supervisors of election may be appointed and commissioned in said ward, as provided in said act. And your petitioners will ever pray."

This petition was presented on Oct. 24, 1873, to the chief justice, by whose order notice was published in the "Boston Daily Advertiser" and "Boston Post," to all persons interested in the matter thereof, or in a like petition in relation to any other ward, to appear before the justices of the supreme judicial court, at the court house in Boston, on October 27, at two o'clock in the afternoon, that they might then and there show cause, if any they had, why the prayer of the petition should or should not be granted.

At the time appointed, the matter was argued by L. M. Child *for the petitioners*, and by P. A. Collins, *contra*, before Gray, C. J., Wells, Ames, Morton and Endicott, J.J., and after a consultation of all the judges, their opinion was delivered on the same day by

Gray, C. J.: This application is made under the St. of 1873, c. 376, § 1, which provides as follows: — "Whenever, prior to an election, five legal voters of any ward of a city shall make known in writing to a justice of the supreme judicial court, in term time or vacation, their desire to have such election guarded and scrutinized, it shall be the duty of such justice, upon such notice as he shall deem meet, or without notice, prior to such election, to appoint and commission two legal voters of such ward, who shall

be of different political parties, and shall be known and designated as supervisors of election. Before entering upon the duties of their office, the said supervisors shall be duly sworn to the faithful and impartial discharge of the same."

As the application appeared to involve a grave question of constitutional law, and a similar application might according to the terms of the statute be presented to a justice of this court at any time, the matter has been argued before five of the judges, and our brethren who could not attend at the argument have taken part in the consultation.

The intention of the legislature is clearly expressed that supervisors of elections should be appointed by the justices of this court. The question is whether the statute is constitutional.

The Constitution, being the fundamental law of the Commonwealth, established by the people, binds and controls all their servants, legislative, executive and judicial. Every person chosen or appointed to any office is expressly required, before entering upon the discharge of its duties, to take an oath to support the Constitution. And by the eighteenth article of the Declaration of Rights a frequent recurrence to the fundamental principles of the Constitution is declared to be absolutely necessary to preserve the advantages of liberty and to maintain a free government.

The legislature is vested by the Constitution with full power and authority from time to time to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, "so as the same be not repugnant or contrary to this Constitution," as they shall judge to be for the good and welfare of this Commonwealth, and for the governing and ordering thereof, and of the subjects of the same. Every reasonable inference is to be drawn in favor of the validity of the acts of each branch of the government. But whenever application is made to the judiciary to carry into effect any statute in a particular case, and the statute in question appears to be clearly repugnant to the Constitution, it is the duty of the judges to obey the Constitution and disregard the statute.

The people of Massachusetts, warned by experience of the inconveniences and dangers arising from the vesting of incompatible powers in the same persons under the royal government while this state was an English province, have made most careful provision for separating the three great departments of government, and for removing the judiciary, and especially this court, from political influences of every kind, as far as possible.

The final article of the Declaration of Rights declares that "in the government of this Commonwealth the legislative department

shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the executive or legislative powers, or either of them; to the end it may be a government of laws and not of men." The Constitution further expressly prohibits the judges of this court to hold a seat in the house of representatives, senate or council, or any other office or place under the authority of this Commonwealth, except that of justices of the peace through the state; and requires all commissions to be signed by the governor, and attested by the secretary or his deputy, and to have the great seal of the Commonwealth affixed thereto.

The justices of this court, as incidental to the large and varied judicial powers and jurisdiction conferred upon them by the Constitution and laws, embracing cases criminal and civil, in common law, equity, probate and divorce, may be and have been by many statutes authorized to appoint subordinate officers of various kinds to assist in the performance of their judicial duties, such as auditors, special masters in chancery, commissioners to take depositions in other States in cases pending here, commissioners to take bail, commissioners for the partition of lands, division of flats, or the setting off of dower, commissioners of sewers, or for the improvement of meadows and low lands, and commissioners to adjust the rights of transportation and modes of connection between connecting lines of railroad, or to assess the expenses, as between different counties, towns and other corporations, of maintaining roads or bridges. Parts of the duties performed by some of these officers in carrying out their functions are executive in their nature, and of a class which might be imposed by law upon strictly executive officers. But all the officers above enumerated, when appointed by the court, are by express requirement or necessary implication obliged to return a report of their doings to the court for its judicial action.

The judges may also be authorized by law, except so far as otherwise expressly provided by the Constitution, to appoint clerks of courts. But the duties of such clerks, are in no sense executive. they are merely ministerial and incident to the administration of justice.

On like grounds, the courts are authorized, in the absence of the official prosecutor, to appoint a suitable person to perform his duties; and to appoint all officers necessary to the transaction of their business.

The courts may also try the title to many offices by *mandamus*, *quo warranto*, or other proper process. But the title to an office is

a right that has always been held to be a proper subject of judicial decision, except when the Constitution has committed it to other hands. Analogous to this is the power conferred on this court by statute to remove certain officers, and thus to declare a forfeiture of their rights and a determination of their offices.

The power of naturalization may perhaps be considered as one of the powers that may be intrusted by the legislature in its discretion to one or another department of the government. Before the adoption of the federal Constitution, it was habitually exercised by the general court of Massachusetts. Since the adoption of that Constitution, it has been vested by the Congress of the United States, with the assent of the state legislatures, in the judicial tribunals of the states, as well as in those of the nation. As it requires a final determination of all matters of law and fact involved in the admission of the applicant to citizenship, it may appropriately be made a subject of judicial investigation and decision.

The St. of 1873, c. 376, §§ 2, 3, declares that it shall be the duty of the supervisors of election to attend the ward meetings; to challenge the vote of any person whose qualifications they doubt; to remain where the ballot boxes are kept, from the opening of the polls until all the votes are cast, counted, canvassed and sealed up, and the certificates and returns made out; to inspect and scrutinize the manner of voting and the method of keeping and marking the check list; to count and canvass every ballot cast, and, in the event of a disagreement between their count and canvass and those of the ward officers, to make a return of their count and canvass to the mayor and aldermen.

These supervisors, although entrusted with a certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges. We are unanimously of opinion that the power of appointing such officers cannot be conferred upon the justices of this court without violating the Constitution of the Commonwealth. We cannot exercise this power as judges, because it is not a judicial function; nor as commissioners, because the Constitution does not allow us to hold any such office.

The statute in question can find no support in the act of Congress of 1871, c. 99, conferring power to appoint similar officers upon the judges of the circuit court of the United States, or in the action of those judges pursuant thereto; because the Constitution of the United States does not so explicitly restrain the judges from exercising executive or political functions as does the Constitution

of this Commonwealth; and because the circuit judges acted individually and without opportunity of conference, and, so far as we are informed, without any question of constitutional power being raised or argued.

*Petition denied.**

OPINION OF THE JUSTICES TO THE GOVERNOR AND COUNCIL.

117 Mass. 599 (1875).

By Chief Justice Gray, and Associate Justices Wells, Colt, Ames, Morton, Endicott and Devens.

It is the duty of the governor and council, upon application of a person claiming an election as district attorney, to recount the ballots for that office, duly sealed up and preserved under the St. of 1874, c. 376, §§ 42, 46, 47 (Pub. Sts. c. 7, §§ 27, 31), which were cast in towns, but not those cast in cities, and, upon comparison of the ballots so recounted with the other returns, to ascertain which of the persons voted for appears to be elected.

After the governor and council have, upon the application of a person claiming an election as district-attorney, recounted certain ballots given for that office, and have issued a certificate of election to the person appearing to be elected, they have no power to recount other ballots.

On February 17, 1875, the following order was passed by the governor and council, and on February 27 transmitted by the governor to the justices of the supreme judicial court, who on March 5 returned the answer which is subjoined.

Ordered, That the opinion of the supreme judicial court be requested as to the following questions:

1. Under the Constitution and laws of the Commonwealth, is it the duty of the governor and council, upon application of a person claiming an election as district attorney, to recount the ballots for said office, duly sealed up and preserved under the provisions of sections 42, 46 and 47 of chapter 376 of the acts of 1874, and, upon comparison of the ballots so recounted with the other returns, to ascertain which of the persons voted for appears to be elected?

2. If, the facts being as set forth in the first question, a recount of certain ballots has been had, and a certificate of election issued to the person appearing to be elected by such recount, is it the

* By the St. of 1874, c. 376, § 58, the St. of 1873, c. 376, is repealed.

duty of, or is it competent for the governor and council, upon another application by the same person for a recount of other ballots, said application being made within sixty days, and said sections 42, 46 and 47 being duly complied with, to recount such other ballots, and for the governor to issue a certificate of election to the person appearing to be elected by such recount?

3. Would the power and duty of the governor and council in the premises be affected by the fact that, pending the consideration of the second application above referred to, another governor and council had been elected and qualified?

The justices of the supreme judicial court, having considered the questions upon which their opinion has been required by his excellency the governor and the honorable council, respectfully submit the following opinion: —

The nineteenth article of amendment of the Constitution of the Commonwealth, which requires the legislature to prescribe by general law for the election by the people of sheriffs, registers of probate, commissioners of insolvency and clerks of courts in the several counties, and district attorneys in the several districts, leaves the term of office, and the manner of receiving, counting, declaring and returning the votes, and ascertaining and certifying the results of the election to be regulated by the legislature.

The seventh chapter of the General Statutes has constituted the governor and council a board to examine, as soon as may be after receiving them, the returns of votes from the various cities and towns for district attorneys and other officers named in this article of the Constitution; and requires the governor forthwith to transmit to such persons as appear to be chosen to such offices a certificate of such choice, signed by the governor, and countersigned by the secretary of the Commonwealth.

The nature of the duties thus imposed, and the very terms of the statute, show that they are to be performed without unnecessary delay, and that the certificate issued by the governor to any person appearing upon such examination to be elected is the final and conclusive evidence of the determination of the governor and council as to his election.

No provision was made by the General Statutes for the preservation or recount of the original ballots.

The one hundred and forty-fourth chapter of the statutes of 1863 provided that the ballots given in all elections in cities for United States, state, county, city or ward officers, should be sealed up in an envelope by the ward officers, and preserved by the city clerk for at least sixty days; enabled the mayor and aldermen, upon the

representation of ten citizens of any ward, and within the time prescribed by law for examining the returns and determining the results of the election, to examine the ballots and cause the return of the ward to be amended accordingly; and further provided that if within sixty days of an election, any person who received votes for any office should serve upon the city clerk "a written notification claiming an election to such office, and declaring an intention to contest the right of any person who has received or who may receive a certificate of election for the same, the city clerk shall retain such ballots, sealed as aforesaid, subject to the order of the body to which such person shall claim to have been elected, or until such claim shall have been withdrawn or finally decided."

This last provision confers no power to recount the original ballots, but simply provides for their preservation as evidence until the contested election is determined by any board, body or tribunal in the exercise of the powers otherwise vested in it by Constitution or statute. The words "subject to the order of the body to which such person shall claim to have been elected," are adapted to the case of a person claiming to be elected a member of a body which is the judge of the elections, returns and qualifications of its members, as the national house of representatives is by the Constitution of the United States, each branch of the general court by the Constitution of the Commonwealth, and the board of aldermen and common council of cities by municipal charters; but they can have no application to the governor and council in the examination of the returns of votes for an office which does not constitute the person elected to it a member of their board.

It follows that the statute of 1863 conferred upon the governor and council no authority to recount the ballots for the office of district attorney.

No provision having been previously made for the preservation and recount of ballots in towns, by the municipal officers or otherwise, the fortieth chapter of the statutes of 1871 provided that, at all elections in towns for officers other than town officers, the ballots should be sealed up in an envelope by the selectmen, and preserved by the town clerk sixty days, "and if within that time any person voted for serves notice on him in writing, claiming an election and desiring a recount of said ballots, the clerk shall continue to hold such envelope, subject to the order of the legislative body to which such person claims an election, or, in other cases, of the board required by law finally to examine the returns and issue certificates of election; and in all such cases said legislative body or board may take and open said envelope and recount the ballots thus preserved."

Under that statute, the governor and council must be deemed "the board required by law finally to examine the returns and issue certificates of election" to the office of district attorney, and consequently authorized to recount the ballots, so sealed up and preserved, for any person for that office, and to take into consideration the ballots so recounted, in connection with the other returns, in ascertaining which of the persons voted for appears to be elected.

But this authority to recount the ballots is incidental to the powers conferred by the General Statutes to examine the returns and issue a certificate of election, and does not warrant the recall of a certificate once issued, or the issue of a second certificate.

The three hundred and seventy-sixth chapter of the statutes of 1874 contains a re-enactment, in sections 40–42, of the provisions of the statute of 1863, and in sections 46–48, of those of the statute of 1871; and in section 58, repealing all those provisions, declares that the provisions of this act, so far as they are the same as those of existing laws, shall be construed as a continuation of such laws, and not as new enactments.

From these considerations it follows that the first question proposed must be answered in the affirmative so far as it relates to ballots in towns, and in the negative so far as it relates to ballots in cities; and that the second and third questions proposed must be answered in the negative.

Boston, March 5, 1875.

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

122 Mass. 594 (1877).

By Chief Justice Gray, and Associate Justices Colt, Ames, Morton, Endicott, Devens and Lord.

The provision of the twenty-first article of amendment of the Constitution of the Commonwealth, which requires every representative in the general court to have been for one year at least next preceding his election "an inhabitant of the district for which he is chosen," is satisfied by his having dwelt or had his home within the district for that time; and a person, otherwise qualified, who having been an alien, has been naturalized within the year, is eligible as a representative. Under the Con-

stitution of the Commonwealth, an alien must be naturalized before he can become eligible as a member of the house of representatives.

The following order was passed by the house of representatives on Feb. 26, 1877, and on February 28, transmitted by the speaker to the justices of the supreme judicial court, who on March 7, returned the answer which is subjoined

Ordered, That the opinion of the justices of the supreme judicial court be required upon the following questions of law, viz.:

1. What is the meaning of the word "inhabitant," as used in article 21 of the amendments to the Constitution of Massachusetts, in the provisions relating to the qualifications of representatives?

2. Is a person, otherwise qualified, eligible as a member of this house, who, having been an alien, has been naturalized within one year next preceding his election?

3. Must an alien be naturalized before he can become eligible as a member of this house?

The justices of the supreme judicial court, having considered the questions proposed by the Honorable House of Representatives, respectfully submit the following opinion:

The general principles and the rules of construction, which must guide us in answering these questions, are clearly set forth in an opinion submitted to the Honorable House in 1811 by Chief Justice Parsons and Justices Sewall and Parker (each afterwards chief justice), printed in full as a supplement to the seventh volume of the Massachusetts Reports, and in the Reports of Controverted Elections, published in pursuance of a resolve of the general court in 1852, and from which it is sufficient to quote a few sentences.

"We assume, as an unquestionable principle of sound national policy in this State, that, as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated by any but citizens, and only to citizens. It is therefore to be presumed that the people, in making the Constitution, intended that the supreme power of legislation should not be delegated but by citizens. And if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words, which do not necessarily imply it, but from clear and manifest expressions, which are not to be misunderstood.

"But the words 'inhabitants' or 'residents' may comprehend aliens, or they may be restrained to such inhabitants or residents who are citizens, according to the subject matter to which they are applied. The latter construction comports with the general design of the Constitution. There the words 'people' and 'citizens' are synonymous. The people are declared to make the Constitution for themselves and their posterity. And the representation in the general court is a representation of the citizens."

Such were the reasons upon which those eminent judges declared it to be their opinion that the authority given by the Constitution, as originally adopted, to "inhabitants of each town" to vote for senators, and to persons "resident in any particular town," to vote for representatives, was restrained to such inhabitants and residents as were citizens; and that aliens, whether their polls were or were not ratable, were not qualified voters for senators or representatives, and could not be qualified to hold either of those offices.

The position that the electors and the elected alike must be citizens of the Commonwealth, is supported by several articles of the Declaration of Rights. "The people of this Commonwealth have the sole and exclusive right of governing themselves, as a free sovereign and independent State; and do and forever hereafter shall exercise and enjoy every power, jurisdiction and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled." "The people alone have an incontestable, unalienable and indefeasible right to institute government; and to reform, alter or totally change the same, where their protection, safety, prosperity and happiness require it." "All the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected for public employments." "No part of the property of any individual can with justice be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent." So, that part of the Constitution, which relates to the house of representatives, begins by declaring, "there shall be in the legislature of this Commonwealth, a representation of the people."

The use of the word "inhabitants" in the sense of "citizens" is further illustrated by the following: Part the First of the Constitution is entitled "A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts." Part the Second, entitled "The Frame of Government," opens with these words: "The people inhabiting the territory formerly called the Province of Massachusetts Bay, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign and independent body politic or state, by the name of the Commonwealth of Massachusetts." Power is conferred upon the legislature to erect and constitute courts, to be held in the name of the Commonwealth, for the trial and determination of all causes between

or concerning "persons inhabiting, or residing, or brought within the same," and to impose and levy rates and taxes upon "all the inhabitants of, and persons resident, and estates lying within the said Commonwealth;" thus clearly distinguishing inhabitants or citizens from other persons having a domicile within the Commonwealth or temporarily brought here.

The Constitution further provides that, "to remove all doubts concerning the meaning of the word 'inhabitant,' in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district or plantation where he dwelleth, or hath his home." In the light of the other clauses of the Constitution, already quoted, and of the opinion of the justices, before referred to, we can have no doubt that every person elected a representative or a senator must not merely have a domicile within the town or district, but must be a citizen of the Commonwealth.

No particular discussion was had in the former opinion, or is necessary to the decision of the questions now before us, of the meaning of the word "inhabitant," as used in those provisions of the original Constitution, which required the governor and lieutenant-governor and every senator to have been an "inhabitant of this Commonwealth," for a certain number of years, and every representative to have been "an inhabitant of the town he shall be chosen to represent," for at least one year, next preceding his election. Considering that the word "inhabitant" as we have already seen, is used in so many other clauses in the sense of "citizen," and that it is nowhere used so as to require a different interpretation, it might be contended with great force, and may for the purposes of argument be assumed, that it must retain the same restricted meaning throughout the original Constitution. But the amendments since adopted present this matter in a different aspect.

By the third article of amendment of the Constitution, adopted in 1820, the right of voting for governor, lieutenant-governor, senators and representatives was limited to "every male citizen of twenty-one years of age and upwards (except paupers and persons under guardianship), who shall have resided within the Commonwealth one year, and within the town or district in which he may claim a right to vote, six calendar months next preceding any election," and shall have paid a state or county tax assessed upon him within two years in any town or district of the Commonwealth. This amendment, by substituting for "inhabitant" the more precise word "citizen" in defining the qualification of the

voter at the time of the election, and the more comprehensive word "residing," in describing his condition for a previous period, manifests the intention of the convention in framing the amendment, and of the people in adopting it, to have been that, while citizenship should be a necessary qualification of every voter at the time of casting his vote, domicile only should be required to prepare him for the exercise of that privilege. The practical construction, in accordance with this view, has been to allow foreigners, having paid the requisite tax, and having had a domicile within the town and the Commonwealth, respectively, for the times specified, and having been naturalized at any time before an election, to vote thereat.

By the thirteenth article of amendment, adopted in 1840, "a census of the inhabitants of each city and town" was ordered to be taken every ten years; and provision was made for the apportionment of representatives according to "the number of inhabitants," also called "the population," of towns, and according to "the population of the Commonwealth."

By the sixteenth article of amendment, adopted in 1855, "eight councillors shall be annually chosen by the inhabitants of this Commonwealth, qualified to vote for governor," the legislature is required, at its first session after each decennial census, to divide the Commonwealth into districts for the purpose, "each containing a number of inhabitants as nearly equal as practicable;" and "no person shall be eligible to the office of councillor, who has not been an inhabitant of the Commonwealth for the term of five years immediately preceding his election."

By the twenty-first article of amendment, which was adopted in 1857, and superseded the amendment of 1840, it is provided that "a census of the inhabitants of each city and town," making "a special enumeration of the legal voters," shall be taken every ten years; that the Commonwealth shall be divided into districts for the choice of representatives, according to the number of legal voters; and that "every representative, for one year at least next preceding his election, shall have been an inhabitant of the district for which he is chosen, and shall cease to represent such district when he shall cease to be an inhabitant of said Commonwealth."

By the twenty-second article of amendment, adopted at the same time, similar provisions are made in regard to senators; and it is required that each senator "shall have been an inhabitant of this Commonwealth five years at least, immediately preceding his election, and at the time of his election shall be an inhabitant of the district for which he is chosen, and he shall cease to represent

such senatorial district when he shall cease to be an inhabitant of the Commonwealth."

The census of inhabitants, required by the amendments of the Constitution, clearly includes, by the very force of the terms, as well as in the understanding of the legislature, as manifested in every statute upon the subject for more than twenty years past, all persons of whatever age, sex or nationality, having a legal domicile within the Commonwealth.

Upon a review of all the provisions of the Constitution and of the various amendments thereof, and applying the rules of construction laid down in the opinion of the justices in 1811, and already quoted, our conclusion is, that the word "inhabitant" is used, throughout the twenty-first article of amendment, in its larger and more popular sense, as implying domicile only, and not citizenship; and that the clause in this amendment which requires that every representative shall have been an inhabitant of the district for a year before his election, like that clause of the third amendment, which requires each voter to have resided within the Commonwealth for a year, and within the district for six months, is satisfied by having had a domicile for the prescribed period; but that, as it cannot be inferred, not being clearly manifested, that the people intended that their supreme legislative power should be delegated either by or to any but citizens, therefore the representatives of the people, through whom the people exercise the legislative power, must themselves be citizens, equally with those by whom they are chosen and whom they represent, and the representatives, like the voters, must, at the time of the election, be citizens of the Commonwealth.

In our opinion, therefore, the questions proposed by the Honorable House of Representatives must be answered as follows:

1. The meaning of the word "inhabitant," as used in the twenty-first article of the amendments to the Constitution of Massachusetts, in the provisions relating to the qualifications of representatives, is "dwelling, or having his home," and does not include citizenship.

2. A person, otherwise qualified, is eligible as a member of the house of representatives, who having been an alien, has been naturalized within one year next preceding his election.

3. An alien must be naturalized before he can become eligible as a member of the house of representatives.

The fulness with which we have referred to and quoted the provisions of the Constitution, and of the Declaration of Rights, which forms part thereof, must find its excuse in the fact that the determination of the questions proposed has appeared to us to depend

upon a careful comparison of those provisions, and in the admonition of the Constitution itself that a frequent recurrence to its fundamental principles is absolutely necessary to preserve the advantages of liberty and to maintain a free government.

Boston, March 7, 1877.

ANSWER OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

122 Mass. 600 (1877).

By Chief Justice Gray, and Associate Justices Ames, Morton, Endicott, Lord and Soule.

The object of c. 3, art. 2, of the Constitution of Massachusetts, by which "each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law and upon solemn occasions" is to enable the advice of the judges to be obtained upon any important question of law which the body making the inquiry has occasion to consider in the exercise of the legislative or executive powers intrusted to it, but not upon a question which may arise in the course of judicial administration, and which cannot be affected by legislative or executive action.

The justices of the supreme judicial court prayed to be excused from giving an opinion to the house of representatives upon the following questions: "First. Is a special justice of a municipal, district or police court such a judge as the eighth article of amendment to the Constitution declares shall not have a seat in the house of representatives? Second. If the first question is answered in the affirmative, does the acceptance of the legislative vacate the judicial office?"

On May 8, 1877, the following order was passed by the House of Representatives, and on May 10 transmitted by the speaker to the justices of the supreme judicial court, who on May 14 returned the subjoined answer:

Ordered, That the opinion of the justices of the supreme judicial court be requested upon the following questions of law, viz.:

First. Is a special justice of a municipal, district or police court such a judge as the eighth article of amendment to the Constitution declares shall not have a seat in the House of Representatives?

Second. If the first question is answered in the affirmative, does the acceptance of the legislative vacate the judicial office?

The undersigned, justices of the supreme judicial court, having taken into consideration the order passed by the Honorable House

of Representatives on the eighth, and transmitted to them on the tenth day of the present month, respectfully submit the following answer:

The eighth article of amendment of the Constitution of the Commonwealth declares that "no judge of any court of this Commonwealth (except the court of sessions) shall, at the same time, hold the office of governor, lieutenant-governor, or councillor, or have a seat in the senate, or house of representatives of this Commonwealth."

The inquiry proposed by the Honorable House, in the form of two successive questions, is in substance but one, namely, whether, by the effect of this provision of the Constitution, a special justice of a municipal, district or police court vacates his judicial office by accepting a seat in the house of representatives.

The Constitution authorizes each branch of the legislature, as well as the governor and council, to require the opinions of the justices of the supreme judicial court "upon important questions of law and upon solemn occasions."

The object of this clause appears to us to be to enable the senate, the house of representatives, or the governor and council, to obtain the advice of the justices upon any important question of law which the body making the inquiry has occasion to consider in the exercise of the legislative or executive powers intrusted to them respectively.

In view of the separation, established by the Constitution, between the legislative, the executive and the judicial departments of the government, we can hardly suppose it to have been the intention that either the legislative or the executive should demand of the judiciary its opinion, in advance, upon a question which may arise in the course of judicial administration, and which cannot be affected by legislative or executive action.

Without undertaking to define the limits of the authority to require opinions from the judges, or to enumerate all the cases in which this authority has been exercised and recognized, we would refer in a general way to some of the more familiar ones, as illustrating the scope of the constitutional provision.

Opinions have been given, when required by the governor and council, upon questions of law affecting the constitution of the council; or involved in the exercise of the power of the governor to veto bills or resolves; of the power vested in him as commander-in-chief of the militia; of his power, with the advice of the council, to appoint or remove public officers, to pardon offences, or to issue warrants for the execution of capital sentences; or in the discharge of duties imposed upon the governor and council by

statute, such as issuing warrants for the payment of claims against the Commonwealth, or canvassing returns of votes for public officers.

Opinions have been given to the senate, or to the house of representatives, upon the construction and effect of the Constitution, and of existing statutes, with a view to further legislation; upon questions whether a bill has been so laid before the governor as to become a law by lapse of time without his approval; upon questions relating to the votes for governor and lieutenant-governor, which are directed by the Constitution to be counted by the senate and house of representatives; or to the election of councillors, while such election was required by the Constitution to be made by the two houses; or to the election, returns or qualifications of senators or representatives, of which the senate and the house respectively are the final judges.

In two instances, in 1844 and in 1852, in which questions as to the legal effect of a contract, created by statute, between the Commonwealth and a private corporation, were proposed by the house of representatives and the senate respectively, apparently with a view to further legislation, Chief Justice Shaw and his associates, gave opinions with some hesitation, saying;

"As the questions, on the face of them, seem to involve a controverted question of right between the Commonwealth and a private corporation, a question apparently and peculiarly fit to be decided in a regular course of judicial proceeding, we had doubts, at the first view of the subject, whether it was a case coming within the intent of the Constitution, pursuant to which questions of law are to be proposed; and whether it might not be expedient first to submit to the consideration of the Honorable House, whether it would be expedient to request an *ex parte* opinion in such a case. Our doubt was this; As we have no means, in such case, of summoning the parties adversely interested before us, or of inquiring, in a judicial course of proceeding, into the facts upon which the controverted right depends, nor of hearing counsel to set forth and vindicate their respective views of the law, such an opinion, without notice to the parties, would be contrary to the plain dictates of justice, if such an opinion could be considered as having the force of a judgment, binding on the rights of parties." *

The question now referred to us, does not regard the construction or effect of any statute or of any contract with the Commonwealth, or any matter which can be affected by legislation. It depends upon a provision of the Constitution, which, so far as

* Opinions of Justices, 5 Met. 596; 9 Cush. 604.

it applies, operates by its own force. The question does not purport to relate to the election or qualifications of a member of the house of representatives. But the question is, whether a certain judicial officer, by accepting a seat in the House, vacates his judicial office.

This appears to us to be not a legislative, but a judicial question, which cannot be definitively or justly decided without trial and argument.

At the recent session of the full court in the county of Suffolk, it was adjudged that a person, once duly commissioned and qualified as a special justice of a police court, who continued publicly to exercise the office after being elected and admitted to a seat in the house of representatives, was, if not a justice *de jure*, a justice *de facto;* and that the validity of his acts as such could not be contested in a summary manner upon a writ of habeas corpus, by a person whom he had sentenced to imprisonment; but only upon a suit against him, either by information on behalf of the Commonwealth, or by action by the person injured. * It is within the official authority of the attorney-general to file such an information, and it is the constitutional right of the party to bring such an action. The court may therefore be called upon at any time to determine the question in a judicial proceeding, in which any opinion now expressed would not bind the court or the parties.

For the reasons thus briefly and imperfectly stated, the justices of the supreme judicial court (except Mr. Justice Colt, whom there has been no opportunity to consult), with great deference and respect to the Honorable House of Representatives, pray to be excused from further consideration of the subject, until it shall have been presented and argued by counsel in the ordinary course of the administration of justice.

Boston, May 14, 1877.

[This answer, upon being received by the house of representatives, was placed on file and printed with the documents of the House, and no further action was taken in the matter.]

* Sheehan's case, 122 Mass. 445.

COMMONWEALTH *v.* NATHAN M. HAWKES.

123 MASS. 525.

ESSEX, Nov. 7, 1877 — Jan. 1, 1878. MORTON and SOULE, J. J., absent.

A special justice of a police court is a "judge of any court of this Commonwealth (except the court of sessions)" within the eighth article of the amendment of the Constitution, and therefore cannot at the same time have a seat in the House of Representatives.

Such a judge, as the eighth article of amendment of the Constitution of the Commonwealth declares shall not have a seat in the House of Representatives, legally vacates his judicial office by accepting a seat in the House, and, if he continues to exercise the functions of a judge, may be ousted by an information in the nature of a *quo warranto*.

Information, filed July 9, 1877, by the attorney-general in behalf of the Commonwealth, alleging that in the city of Lynn, in the county of Essex, there was and long had been established a police court; that the said police court consisted of one standing justice and of two special justices; that on Jan. 15, 1867, Nathan M. Hawkes of said Lynn was duly appointed and commissioned a special justice of said police court, and since said January 15 had acted as such special justice; that he was duly elected a member of the house of representatives of the Commonwealth for the year 1877, and on Wednesday, Jan. 3, 1877, took his seat as a member of the house of representatives, in accordance with his election, and had ever since and still held his seat in the house of representatives; that, by reason thereof, he ceased to be a special justice of said police court, yet he had ever since that day continued to act and still acted as special justice of said court; and concluding as follows: "Wherefore said attorney-general giveth the court to understand and be informed that said Hawkes, without any legal warrant or right whatever, is in the use and exercise of said office of justice of the police court in the city of Lynn, and has usurped the same, in contempt of said Commonwealth, and against the peace and dignity of the same. Whereupon said attorney-general for said Commonwealth prayeth the consideration of the honorable court here in the premises, and that due process of law may be awarded against him, said Nathan M. Hawkes, in this behalf, to make him answer to the Commonwealth, and show by what authority he claims to have, use and enjoy the office aforesaid."

It was thereupon ordered that notice be given to the defendant

to appear on a day named, and show cause why the prayer of the information should not be granted.

The defendant appeared and filed a demurrer to the information; and the case was reserved by Lord, J., for the consideration of the full court on the information and demurrer.

R. E. HARMON *for the defendant.*

1. A justice of a police court is not a judge of any court within the meaning of the eighth article of amendment of the Constitution. In 1821, the time of the adoption of the amendment, there were no police courts in the Commonwealth. The act then applied only to the supreme, common pleas and probate courts. The court of sessions, excepted in the amendment, had jurisdiction of matters formerly within the jurisdiction of the court of common pleas. The amendment applies only to superior courts of judicature, of which the probate court is one. The jurisdiction of police courts is substantially that then exercised by justices of the peace, and is not within the amendment.

2. A special justice is not a judge of the court. He may act under certain circumstances, as a coroner may serve a writ, but the one is not a sheriff nor the other a judge. In certain contingencies he can act in place of the justice, but he is not a justice even in name.

3. The offices are not incompatible at common law. Judges of the highest courts have always sat in at least one house of Parliament. They are not made so in terms by the eighth article of amendment of the Constitution, but a seat in either House of the legislature is denied specifically. The eighth article of amendment made very considerable changes in the law as to incompatibility and plurality of offices, so that the law before that time affords no guide to the meaning of the amendment. The article contains two provisions.

The first relates to state offices, and provides that certain officers, including United States officials, over whose tenure of office it can exercise no control, shall not hold certain state offices, over which it has full control. The second relates to state officers accepting certain United States offices, and provides that they shall not continue to hold the state offices, but the acceptance of the national offices shall be deemed a resignation of the state office. The first provision alone concerns this case. Can the words "shall not hold," in case of a United States official, receive their literal sense, and in case of a judge receive a constructive meaning precisely opposite to the literal one? Shall the plain penalty of the law be always evaded by creating a constructive vacancy? The second clause of the amendment forcibly suggests that the first clause was to receive its literal sense, since it vacates the first office only

where it has no control over the second. Again, the eligibility of a member to his seat is more easily, naturally and readily determined than the right to the other offices. The construction that the seat is invalid has been held many times under this amendment and the constitutional provisions in force before it. Mass. Election Cases, (ed. 1853) 28–30, 251.

W. C. Loring, Assistant Attorney-General, (C. R. Train, Attorney-General, with him), *for the Commonwealth.*

Gray, C. J.: The decision of this case depends upon the construction and effect of that provision of the eighth article of amendment of the Constitution of the Commonwealth, adopted by the people in 1821, which declares that "no judge of any court of this Commonwealth (except the Court of Sessions)" "shall at the same time hold the office of governor, lieutenant-governor, or councillor, or have a seat in the senate or house of representatives of this Commonwealth."

The court of sessions never had any jurisdiction of civil actions; the criminal jurisdiction which it formerly had was transferred in 1804 to courts of common pleas; and its functions at the time of the adoption of the constitutional amendment, were principally administrative, as the agent and representative of the county in all matters touching its finances and general prudential concerns, such as the allowance and settlement of county accounts, the estimate and apportionment of county taxes, the erection and repair of county buildings, the granting of licenses, the laying out, altering and discontinuing of highways, the establishment and regulation of ferries, and generally exercising such powers as have since been vested in county commissioners. Sts. 1803, c. 154; 1807, c. 57; 1818, c. 120; 1819, c. 139; 1827, c. 77; Rev. Sts. cc. 14,26; Gen. Sts. cc. 17, 47; *Hampshire* v. *Franklin*, 16 Mass. 76, 88; *Commonwealth* v. *Holmes*, 17 Mass. 336; *Fay, petitioner*, 15 Pick. 243; *Dearbon* v. *Ames*, 8 Gray, 1, 14.

At that time, the strictly judicial power was distributed among other courts and magistrates. Justices of the peace had criminal jurisdiction of simple assaults and batteries, and civil jurisdiction of actions in which the debt or damages demanded did not exceed twenty dollars. Sts. 1783, c. 51; 1807, c. 123. The courts of common pleas had jurisdiction of most other civil actions, with a right of appeal, on fact as well as law, to this court whenever the debt or damages demanded exceeded seventy, or, afterwards, one hundred dollars. Sts. 1811, c. 33; 1813, c. 173; 1817, c. 185; 1820, c. 79. The jurisdiction of all crimes, except simple assaults and perhaps some other petty offences, was in this court, or in the

courts of common pleas, or in the municipal court of Boston. Sts. 1782, c. 9; 1799, c. 81; 1803, c. 154; 1807, c. 57; 1812, c. 133; 1820, c. 79; *Commonwealth* v. *Knowlton*, 2 Mass. 530; *Commonwealth* v. *Johnson*, 8 Mass. 87; *Commonwealth* v. *Holmes*, 17 Mass. 336, 340; *Commonwealth* v. *White*, 8 Pick. 453; *Brien* v. *Commonwealth*, 5 Met. 508, 513, 514.

In the light of these facts, we cannot doubt that the intention of the Constitution, as amended, was to exclude the judges of all organized courts, established to administer the judicial power of the Commonwealth, from sharing in the exercise of the supreme legislative or executive power.

Police courts were created after the adoption of the constitutional amendment in question, and were at first vested with the same criminal and civil jurisdiction as justices of the peace. St. 1821, c. 109, §§ 2, 6; Rev. Sts. c. 87, §§ 1, 3, 11, 32, 34; St. 1849, c. 86. The courts thus established were organized judicial tribunals, having attributes, and exercising functions independently of the magistrates designated to hold them, and were thus distinguished from justices of the peace, on whom personally certain judicial powers are conferred by law; and the judges of such courts must by the Constitution be appointed during good behavior instead of for seven years, as in the case of justices of the peace. *Opinion of Justices*, 3 Cush. 584; *Gladhill, petitioner*, 8 Met. 168, 170; *Bannegan* v. *Murphy*, 13 Met. 251. The inevitable conclusion is that each of these courts is a court of this Commonwealth other than the court of sessions, within the meaning of the amendment of the Constitution.

This conclusion would be confirmed, if necessary, by the consideration that, by later statutes, all police courts have been vested with jurisdiction, concurrently with the superior court, of many crimes, and of all personal actions and proceedings in civil cases in which the amount demanded or the value of the property claimed does not exceed three hundred dollars, and so exercise at the present day a considerable portion of the judicial power which in 1821 was vested in the courts of common pleas or in the municipal court of Boston. Gen. Sts. c. 116, §§ 13, 14; St. 1871, c. 144.

A special justice of a police court holds his office by the like appointment and tenure as the standing justice, and in case of his absence or disability, or at his request, may hold a session and exercise all the powers of the court, and is in every sense a judge thereof. Gen. Sts. c. 116, § 22; *Dike* v. *Story*, 7 Allen, 349; *Commonwealth* v. *McCarty*, 14 Gray, 18.

The defendant therefore could not lawfully hold, at one and the same time, the office of a special justice of the police court of

Lynn, and a seat in the house of representatives; and the remaining question in the case is, which of these two public trusts he lawfully held, after unlawfully attempting to hold both. If he did not lawfully hold a seat in the House, he could be unseated only by the House itself, which is by the Constitution, the final judge of the elections, returns and qualifications of its own members. (Const. Mass. c. 1, § 3, art. 10.) But if he unlawfully holds a judicial office, this proceeding, by information in behalf of the Commonwealth, is the proper process to oust him from the office which he occupies *de facto*, but to which he has no legal right. *Fowler* v. *Bebee*, 9 Mass. 231, 235; *Commonwealth* v. *Fowler*, 10 Mass 290, 301; *Sheehan's* case, 122 Mass. 445; *Answer of Justices*, 122 Mass. 600, 604.

By the common law, when two offices or public trusts are incompatible with each other, a person holding the one, is not disqualified to be appointed or elected to the other, but his acceptance of the second office is in law an implied resignation of the first, whenever it may be resigned by the mere act of the incumbent, without the assent or concurrence of a superior authority. *Milward* v. *Thatcher*, 2 T. R. 81; *The King* v. *Hughes*, 5 B. & C. 886; S. C. 8 D. & R. 708; *The King* v. *Tizzard*, 9 B. & C. 418; S. C. 4 Man. & Ry. 400; *The King* v. *Patteson*, 4 B. & Ad. 9; S. C. 1 Nev. & Man. 612; *Worth* v. *Newton*, 10 Exch. 247; *People* v. *Carrique*, 2 Hill (N. Y.) 93; *People* v. *Nostrand*, 46 N. Y. 375, 381; *Stubbs* v. *Lee*, 64 Maine, 195; *Commonwealth* v. *Kirby*, 2 Cush. 577. There may be municipal or county offices that a person cannot decline to accept, and therefore has no right to resign at his own will. But under the Constitutions of the United States and of this Commonwealth, at least a judicial office, depending upon the appointment of the executive, no person is obliged to accept, or to hold longer than he pleases, but has the absolute right to resign at any time. *United States* v. *Wright*, 1 McLean, 509.

It follows that the defendant, by taking the seat to which he had been elected in the house of representatives, legally vacated his judicial office, unless there is something in the Constitution itself which controls the general law. Upon examination of all the provisions of the Constitution on the subject, we are of opinion that they affirm, rather than reverse or qualify, the rule of the common law as applicable to the case. In order to make the discussion intelligible, it is necessary to recite those provisions.

The original Constitution of the Commonwealth, adopted in 1780, contains in c. 6, art. 2, the following provisions as to incompatibility of offices:

"No governor, lieutenant-governor, or judge of the supreme judicial court, shall hold any other office or place under the authority of this Commonwealth, except such as by this Constitution they are admitted to hold, saving that the judges of the said court may hold the offices of justices of the peace through the state; nor shall they hold any other place or office, or receive any pension or salary from any other state or government or power whatever.

"No person shall be capable of holding or exercising at the same time, within this state, more than one of the following offices, viz., judge of probate, sheriff, register of probate or register of deeds; and never more than any two offices which are to be held by appointment of the governor, or the governor and council, or the senate, or the house of representatives, or by the election of the people of the state at large, or of the people of any county, military offices and the offices of justices of the peace excepted, shall be held by one person.

"No person holding the office of judge of the supreme judicial court, secretary, attorney-general, solicitor-general, treasurer or receiver-general, judge of probate, commissary-general, president, professor or instructor of Harvard College, sheriff, clerk of the house of representatives, register of probate, register of deeds, clerk of the supreme judicial court, clerk of the inferior court of common pleas, or officer of the customs, including in this description naval officers, shall at the same time have a seat in the senate or house of representatives; but their being chosen or appointed to, and accepting the same, shall operate as a resignation of their seat in the senate or house of representatives, and the place so vacated shall be filled up.

"And the same rule shall take place in case any judge of the said supreme judicial court, or judge of probate, shall accept a seat in council, or any councillor shall accept of either of those offices or places."

The whole of the eighth article of the amendments adopted in 1821 is as follows:

"No judge of any court of this Commonwealth (except the court of sessions) and no person holding any office under the authority of the United States (postmasters excepted) shall at the same time hold the office of governor, lieutenant-governor or councillor, or have a seat in the senate or house of representatives of this Commonwealth; and no judge of any court in this Commonwealth (except the court of sessions) nor the attorney-general, solicitor-general, county attorney, clerk of any court, sheriff, treasurer and receiver-general, register of probate, nor register of deeds, shall continue to hold his said office after being elected a member of the Congress of the United States, and accepting that trust; but the acceptance of such trust, by any of the officers aforesaid, shall be deemed and taken to be a resignation of his said office; and judges of the courts of common pleas shall hold no other office under the government of this Commonwealth, the office of justice of the peace and militia offices excepted."

It is manifest that none of these provisions make the holder of one office or trust, of the class first mentioned in each clause, ineligible, in the strict sense, that is, incapable of being elected or appointed to an office or trust of the other class; for the Constitution never says that such a person shall be ineligible, or shall be incapable of being, or disqualified to be, elected or appointed, but that he shall not "hold" or "continue to hold" or "be capable of holding or exercising" a certain office or trust, or "have a seat," in the senate or house.

It was accordingly decided by the house of representatives in 1800 that a judge of probate, who resigned his judicial office after being elected a representative and before the meeting of the Legislature, was qualified to take his seat in the house. Case of *Sullivan*, Mass. Election Cases (ed. 1853) 39.

In no case does the Constitution provide that the acceptance of the second office or trust shall be void, and the incumbent shall continue to hold the first. But whenever anything is said as to which office or trust a person shall hold, who, already holding one, accepts another incompatible with it, it is, in accordance with the rule of the common law, that such acceptance "shall operate as," or "shall be deemed and taken to be a resignation" of the first. Nor can any implication arise, from the expression of this rule in some cases, that a different rule is intended where none is expressed; because in every case, in which the rule of the common law is recognized, there was special reason for the introduction of the clause that contains such recognition.

In that part of the original Constitution, for instance, which, after declaring that no person holding the office of judge of this court, or either of certain other offices therein enumerated, shall at the same time have a seat in the senate or house of representatives, adds, "but their being chosen or appointed to, and accepting the same, shall operate as a resignation of their seat in the senate or house of representatives, and the place so vacated shall be filled up," the purpose of the addition would appear to have been to make it clear that the senate or house might issue a precept for a new election to fill the vacancy; and such imperfect notes as have come down to us of the debates in the convention which framed the Constitution support this view. (Journal of Convention of 1779–80, pp. 81, 139, 144, 162, 166.) That without such a provision, the right to issue a new precept might be considered doubtful is evident from the *Opinion of the Justices*, 3 Pick. 517.

The further provision, "And the same rule shall take place in case any judge of the said supreme judicial court or judge of probate shall accept a seat in council, or any councillor shall accept

of either of those offices or places," was apparently intended to remove any doubt as to whether a seat in the council should be considered as an "office or place," within the meaning of the first paragraph of the same article, and to declare in the clearest terms the incompatibility of the office of judge of probate as well as of the office of judge of this court, with a seat in the council, and thus cure the evil that had prevailed, under the province charter, when Thomas Hutchinson was at one time lieutenant governor and a member of the council (then also a branch of the legislature) as well as chief justice of the superior court of judicature and judge of probate for the county of Suffolk. (Quincy, 242-244, 226 note; 2 John Adams' Works, 124, 151.)

The eighth article of amendment is in the nature of an addition to the article of the original Constitution on the subject of incompatibility of offices. Its objects, as apparent from its terms, and as stated by Mr. Webster in bringing it before the convention which submitted it to the people, were, 1st, to extend the disqualification of judges to sit in the legislature or the council (which had been previously limited to judges of this court and judges of probate) to judges of other courts; 2d, to prevent the holding by the same person at the same time of important offices or trusts under the state government and under the Constitution of the United States, which had been established since the adoption of the Constitution of the Commonwealth; 3d (which is not material to the present inquiry), to restrict the number of offices that might be held by the judges of the courts of common pleas. Debates in convention of 1820 (ed. 1853), 124, 187.

The express declaration, in this article of amendment, that the acceptance of the trust of a member of Congress, by any of the state officers mentioned, "shall be deemed and taken to be a resignation of his said office," may well have been inserted to make it manifest that the Commonwealth did not assume to deal with the right to a seat in Congress, the qualifications for which are defined by the Constitution of the United States. And the omission of a corresponding declaration in the earlier part of the same article would seem to have been dictated by the same spirit, in order to avoid saying, what the Commonwealth would have no power to enforce, that an office under the authority of the United States should be vacated by holding an office or seat in the state government.

The cases cited in the defendant's behalf, in which persons holding offices under the United States, have not been allowed by the Massachusetts house of representatives to hold seats therein, do not, giving them the fullest weight, tend to support his position.

All of them but one were decided before the Constitution of the Commonwealth contained any provision as to the incompatibility of national with state offices; and in none of them did it appear that the office under the United States was accepted first, except in the case of David Sewall, then judge of the district court of the United States for the District of Maine, as to whom the question was raised and decided in 1790, upon his appearing to take his seat as a member of the house; so that it is evident that the point was whether, without resigning his judicial office, he could hold a seat in the house of representatives, in the absence of any constitutional provision upon the subject. Mass. Election Cases, 28-30, 251.

On the other hand, the words in question have practically received, as applied to the highest offices of the Commonwealth, the construction that we adopt. Mr. Justice Sumner, under the Constitution of 1780, and Justices Lincoln and Morton, since the adoption of the amendment of 1821, were elected to and accepted the office of governor, while holding the office of a justice of this court, and were recognized by the whole people of the Commonwealth as having lawfully assumed its chief executive office. Mr. Justice Morton certainly resigned his judicial office in no other way than by accepting the office of governor. 1 Met. 1. And it may fairly be presumed that his action was in accordance with that of his predecessors in similar cases.

Demurrer overruled.

OPINION OF THE JUSTICES TO THE HOUSE OF REPRESENTATIVES.

124 Mass. 596 (1878).

By Chief Justice Gray and Associate Justices Colt, Ames, Morton, Endicott, Lord and Soule.

By the third article of amendment of the Constitution of the Commonwealth, the disqualification of pauperism is not required to have ceased to exist for any definite period of time, in order to entitle a man actually free from such disqualification, and otherwise qualified, to exercise the right of suffrage.

The following order was passed by the house of representatives on April 1, 1878, and on April 4, transmitted by the speaker

to the justices of the supreme judicial court, who on April 8, returned the answer which is subjoined.

Ordered, That the opinion of the justices of the supreme judicial court be required upon the following questions of law; viz.:

First. What is the meaning of article third of the amendments to the State Constitution in relation to the exercise of the right of suffrage by persons who have been paupers at any time?

Second. Does the State Constitution require any period of probation or residence, after a person has ceased to be a pauper, before he can exercise the right of suffrage?

The justices of the supreme judicial court, having considered the questions proposed in the order of the Honorable House of Representatives of the first day of the present month, respectfully submit the following opinion:

The third article of amendment of the Constitution of the Commonwealth provides that "every male citizen of twenty-one years of age and upwards (excepting paupers and persons under guardianship) who shall have resided within the Commonwealth one year, and within the town or district, in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant-governor, senators or representatives," and who either shall have paid a state or county tax assessed upon him within two years next preceding, or shall be by law exempted from taxation, shall have a right to vote at such election.

The meaning of the word "paupers" in this article was defined, in an opinion given to the Honorable Senate in 1832, to be persons receiving aid and assistance from the public, for themselves or their families, under the provisions made by law for the support and maintenance of the poor. (11 Pick. 538, 540.) And it has been decided that a man who has been supported by his town as a pauper, but is able to earn more than enough to support himself and has found an employer, and is therefore not actually chargeable to the town and stands in no need of immediate relief, is no longer a pauper. *Wilson* v. *Brooks*, 14 Pick. 341.

We do not understand the order now before us as calling for any particular consideration of what constitutes a pauper, or how the fact of ceasing to be a pauper may be ascertained; but that the whole scope of the inquiry is, whether a person who is admitted to have been, and to have ceased to be, a pauper, must have ceased to be such for any definite period of time before he

can exercise the right of suffrage. We are of opinion that he need not.

The only qualifications, which are required by the amendment of the Constitution to have existed for a certain time, are those of residence within the Commonwealth and within the town or district — in the one for a year, and in the other for six months. The provisions of the original Constitution, which required a property qualification, and for which the provision as to paupers and persons under guardianship has been substituted, were held to be satisfied by a voter's receiving in good faith the requisite amount of property on the morning of the day of election. *Bridge* v. *Lincoln*, 14 Mass. 367. In the article of amendment, the restriction as to paupers and persons under guardianship is not coupled with the provision as to residence, but is inserted by way of exception to the leading clause which secures the right of suffrage to adult male citizens. It is no more required that the voter shall have ceased to be a pauper, or under guardianship, a year or six months before the election, than that he shall have been a citizen, or of age, during a like period. It has never been doubted that minors having the other requisite qualifications, become qualified to vote immediately upon arriving at full age. *Humphrey* v. *Kingman*, 5 Met. 162, 165. And by uniform usage, recognized and approved in an opinion given to the Honorable House last year, persons otherwise qualified, who have been naturalized at any time before the election, have been deemed entitled to vote. 122 Mass. 594, 598.

The necessary conclusion appears to us to be, that by the third article of amendment of the Constitution of the Commonwealth, the disqualification of pauperism or guardianship, like that of alienage or nonage, is not required to have ceased to exist for any definite period of time, in order to entitle a man actually free from every such disqualification, and duly qualified in point of residence and of payment of taxes, to exercise the right of suffrage.

Boston, April 8, 1878.

LEONARD CLARK *v.* BOARD OF EXAMINERS OF HAMPDEN COUNTY.

126 MASS. 282 (1879).

Hampden, January 14; February 14-27, 1879.

The duties of a board of examiners of election returns, under the Gen. Sts. c. 7, § 25,* are purely ministerial, and the board cannot receive or consider evidence of extrinsic circumstances, but is confined to the records of votes returned and laid before it; and mandamus will not lie to compel the board to count certain votes, containing the initial letter only of the Christian name of a candidate, with other votes containing his name in full.

Petition for a writ of mandamus to compel the respondents to count for the petitioner certain ballots for county commissioner purporting to be for "L. Clark of Springfield," and to notify him of his election. At the hearing before *Colt*, J., the case appeared to be as follows:

On Nov. 5, 1878, an election was had for the office of county commissioner for the term of three years from Jan. 1, 1879; and copies of the records of the votes received in the several cities and towns of the county were returned to the clerk of the courts, and by him presented to the respondents, which copies showed votes cast for county commissioner as follows: 6,287 votes for "Leonard Clark of Springfield," 132 votes for "L. Clark of Springfield," 198 votes for "Leonard Clark," 6,421 votes for "Lawson Sibley of Springfield," 114 votes for "Lawson Sibley," and 39 for other persons. The respondents declined to count the votes for "L. Clark of Springfield," as for the petitioner, and found that Lawson Sibley had received a plurality of votes and was elected, and notified him accordingly; but he declined to accept the office.

The petitioner alleged that the name L. Clark was his name in an abbreviated form, and he was as well known by that name, as by his full name of Leonard Clark; and that the votes cast for "L. Clark of Springfield" were intended and should have been counted for him, and it was the duty of the respondents to find him chosen and to notify him of his election. The respondents, in their answer, denied that the petitioner had a plurality of votes, and that L. Clark was his name; and averred that they were ignorant, and had no means or authority for ascertaining, whether he was as well known by the name of L. Clark as by that of Leonard Clark, or whether

* Now Pub. Stats., c. 7, § 48.

the votes returned as given for L. Clark were intended for him. The petitioner offered to prove by parol evidence that the ballots for "L. Clark of Springfield" were intended for him, by those who cast them. The respondents admitted that such was the fact, if competent to be so proved, but objected to the evidence as incompetent and immaterial.

The judge reserved the case for the consideration of the full court; such judgment or order to be entered as law and justice might require.

The case was argued at the bar in January, and afterwards submitted on briefs to the whole court.

M. P. KNOWLTON *for the petitioner.*
G. WELLS *for the respondents.*

GRAY, C. J.: The statutes require that, in all elections, "the names of the persons voted for, the number of votes received for each person, and the title of the office for which he is proposed, shall be entered in words at length" in the town and city records; that copies of the records of the votes for county commissioner in the several cities and towns of each county shall be returned by the city and town clerks to the clerk of the courts, and that on the first Wednesday of the month succeeding the election the board of examiners shall meet, the clerk of the courts shall present the returned copies of votes, "and the board shall open and examine them, and notify the person chosen of his election," and shall within three days after such examination file such copies in the office of the clerk. Gen. Sts. c. 7, §§ 15, 17, 25, 26.*

The petition now before us does not, like an information in the nature of a *quo warranto*, present the whole question of the right to the office of county commissioner, nor involve the consideration of what evidence might be received upon the trial of that right; but simply presents the question whether the examiners have duly performed the duties imposed upon them by the statutes, of examining and counting the votes, and notifying the person thereby appearing to be chosen. The nature and limits of these duties have been clearly defined in former judgments of this court.

"Nothing can be clearer than that the counting the votes and ascertaining the majorities and giving certificates of the result are mere ministerial acts. They have no discretion in determining which of the candidates shall be elected. It must be the result of pure, inflexible mathematical calculation." *Strong, petitioner*, 20 Pick., 484, 497, 498. "They are not made a judicial tribunal,

* Now Pub. Sts., c. 7, §§ 26, 40, 48, 49.

nor authorized to decide upon the validity or the fact of the election, in any other mode than by an examination of 'the returns made to them, according to law. They are not required or authorized to hear witnesses, or weigh evidence. They have no power to send for persons or papers. If one result appears upon the returns, and another is the real truth of the case, they can only act upon the former. If they have done their duty, the remedy of the person actually elected to the office is not to be sought in a mandamus. This court has no power to direct public officers to do any more than their duty, or anything different from their duty." *Luce* v. *Mayhew*, 13 Gray, 83, 85.

In *Strong's case*, above cited, it was held that, if some of the returns added the residence of the candidate and others omitted it, the latter contained all that the statute demanded, and the former were not vitiated by including more; and therefore that the board of examiners, in refusing to add to votes for Elisha Strong of Northampton votes for Elisha Strong simply, put too strict a construction upon the statute and upon the returns. The court said: "The latter are only evidence of the will of the electors expressed by their ballots. If this evidence is such as to produce reasonable conviction of what that will is, it should be allowed to have its legitimate effect. But if they are so indefinite or ambiguous, in their descriptions of the persons voted for, that it cannot be ascertained that any person has a majority of all the suffrages, then the only proper course would be to send the matter back to the people, to give them an opportunity more clearly to express their will." 20 Pick. 494. Under the statutes then in force, a majority of the whole number of ballots cast was necessary to an election, and, if no person had received such a majority, a new election was required. Rev. Sts. c. 4, § 13; c. 14, §§ 18–20. But by the statutes now existing a plurality of votes only is necessary, and the person "having the highest number of votes shall be deemed and declared to be elected." So that a new election cannot be ordered unless two or more persons have an equal number of votes, and it is the duty of the board of examiners to declare that person to be elected for whom the greatest number of votes can be ascertained from the returns to have been cast, although less than a majority of the whole. Gen. Sts. c. 7, § 14; c. 10, § 8.

In the present case, the returns of votes show that 6,287 votes were cast for "Leonard Clark of Springfield," and 198 votes for "Leonard Clark," 6,421 votes for "Lawson Sibley of Springfield" and 114 votes for "Lawson Sibley." These votes, reckoned

according to the rule established in *Strong's case*, show 6,485 votes for Leonard Clark and 6,535 votes for Lawson Sibley, so that Lawson Sibley appears to be elected by a plurality of 50 votes, unless the board of examiners erred in refusing to count for Leonard Clark 132 other votes cast for "L. Clark of Springfield," and the question to be determined is whether the board of examiners erred in declining so to count these votes.

It is quite usual to express the Christian name of persons, both in their own signatures and by other persons, by one letter only, although a single letter rarely constitutes the whole Christian name. The use of an initial letter only, in legal documents, proceedings or votes, is not to be commended, because of the danger of uncertainty in the identification of the person; yet when no doubt of the identity is created, or any such doubt may be removed by competent evidence, the omission to set forth the Christian name at length, either in a person's own signature or in his description by another person (even if the latter knows his full name), though incomplete, is not necessarily erroneous. *Regina* v. *Avery*, 18 Q. B. 576; *Commonwealth* v. *Hamilton*, 15 Gray, 480; *Getchell* v. *Moran*, 124 Mass. 404.

Upon a case of a controverted election, brought before a legislative body vested with the power of determining the elections, returns and qualifications of its own members, or presented to a judicial tribunal by information in the nature of a *quo warranto*, or other proper process to try the title to an office, evidence of extrinsic circumstances, such as that no other person of corresponding initials resided in the same city or county, or had been nominated by public convention or otherwise for the office in question, may be introduced, and may satisfy the tribunal having authority to receive and consider it that votes describing the Christian name by a single letter were intended for the same person as votes setting forth at length a Christian name having a corresponding initial.

But the board of examiners cannot receive or consider such extrinsic evidence, and is confined to the records of votes returned and laid before it according to the statute. Upon the face of the returns, the votes cast for L. Clark of Springfield may possibly indicate a person whose whole Christian name consists of the letter L., or more probably a person having a name of which this letter is the initial, and which may be either Leonard or Lewis or Luther, or any other name beginning with this letter. This is the utmost that can be known from the returns, taken by themselves. The inference, however plausible, that the votes

cast for "L. Clark," were intended to be cast for "Leonard Clark," is left by the returns a matter of conjecture only. It is impossible, therefore, for this court, upon the record before it, to say that the board of examiners erred in refusing to count the votes in question for Leonard Clark.

This view of the case is supported by the opinions of most respectable judges in Maine and in New York. *Opinion of Justices*, 64 Maine, 596; *People* v. *Ferguson*, 8 Cowen, 102, 106, 107; *People* v. *Seaman*, 5 Denio, 409; *People* v. *Cook*, 14 Barb. 259 and 4 Selden, 67; *People* v. *Pease*, 27 N. Y. 45; *People* v. *Smith*, 45 N. Y. 772, 779. In Michigan, the judges, differing from those of New York in the cases just cited, have gone so far as to hold that, even upon an information to try the title to an office, votes describing the Christian name by a single letter could not be added to votes for a person of a corresponding full name. *People* v. *Tisdale*, 1 Doug. (Mich.) 59; *People* v. *Higgins*, 3 Mich. 233; *People* v. *Cicott*, 16 Mich. 283; *People* v. *Molitor*, 23 Mich. 342. In *People* v. *Cicott*, doubts were expressed whether such an application of the rule was not erroneous in principle; but neither in that case, nor in any other with which the learning and research of counsel have supplied us, has it been held to be competent for a mere board of examiners or canvassers to determine that such votes should be counted for the same person.

As Leonard Clark did not appear on the face of the returns to have received a plurality of votes, the contingency did not arise in which it would become the duty of the board of examiners, under the Gen. Sts. c. 7, § 25, to ascertain the person of the name of Clark designated in any of the votes, in order to notify him of his election.

For these reasons, it is the opinion of a majority of the court that the writ of mandamus prayed for must be

Refused.

COMMONWEALTH *v.* LORENZO SMITH.

132 MASS. 289.

Dukes County, Oct. 25, 1881—March 4, 1882. MORTON, C. J., W. ALLEN, and C. ALLEN, J. J., absent

A notice to the inhabitants of a town of the meeting for the annual state election, called upon them to meet on a certain day at a designated place, "to vote for government officers;" was signed by a majority only of the selectmen, without the addition of the name of their office to their signatures; was not directed to or served by a constable or other person appointed by the selectmen for that purpose; but was posted more than seven days before the day of the election in a public place, according to the usual custom of the town, there being no by-law or vote of the town prescribing how warrants for meetings should be served. All but eight of the registered voters of the town were present at the meeting, and of these all voted for the office of county commissioner but one. Of the eight who were not present, five had actual notice of the time and place of the meeting and that a county commissioner was to be voted for, two had been absent at sea more than two weeks prior to the meeting, and one was confined to his bed by sickness. One of the candidates for county commissioner had a plurality of eight votes in all the towns of the county including the town in question. *Held*, upon an information in the nature of a *quo warranto*, that the election in the town in question was valid; and that the defendant was duly elected to the office of county commissioner.

Information in the nature of a *quo warranto*, filed April 1, 1880, by the Attorney-General in behalf of the Commonwealth, and at the relation of Benjamin Clough, alleging that the defendant was usurping the office of county commissioner of the county of Dukes County.

At the hearing before Morton, J., it appeared that the defendant's title to his office depended upon the validity of the notice of the annual meeting held in the town of Gay Head on Nov. 4, 1879, for the election of state and county officers, he having received four hundred and twenty-nine votes, including twenty-four votes cast for him in Gay Head, and Clough, the relator, having received four hundred and twenty-one votes. On the question of the validity of this notice the judge found the following facts, subject to objections as to their competency:

More than seven days before the day of the annual election, a notice of which the following is a copy, was posted by Charles H. Mingo, chairman of the selectmen, on the door of the meeting-house in Gay Head.

"NOTICE.

"To notify the inhabitants qualified to vote in town affairs to meet at the school-house on the fourth day of November next at ten o'clock A. M.

to vote for government officers. Polls will be open from ten o'clock A. M. until two P. M.

CHARLES H. MINGO.
THOMAS JEFFERS.

"GAY HEAD, Oct. 25, 1879."

Another notice, like the above in every particular excepting that it did not have the name of Thomas Jeffers subscribed, was posted on the school-house more than seven days before election day. There was no other warrant or notice of the meeting, and no person was appointed by the selectmen to notify the meeting.

There were no by-laws of the town prescribing how warrants for meetings should be served; but it had been the usual custom of the town to call meetings by posting the warrant or notice in some public place seven days before the day of the meeting. Charles H. Mingo and Thomas Jeffers, who signed said notice, were two of the three selectmen of the town.

On Nov. 4, 1879, the meeting was held at the school-house, and the notice posted on the outside was taken down and read by the town clerk at the opening of the meeting at ten o'clock A. M. The polls were opened at ten A. M. and kept open until two P. M., and votes were cast and received for governor and all other officers voted for at annual elections, including county commissioner. All the proceedings of the meeting were regular and in due form, except as above stated. The whole number of registered voters in said town at that time was thirty-three. Of this number there were present at the meeting twenty five, of whom twenty-four voted for the defendant and one did not vote for any person. Of the other eight who were not present at the meeting, two were absent at sea and had been so absent at sea for more than two weeks prior to the meeting, one was confined to his bed at his house by sickness, so that he was unable to attend the meeting, one was absent at work in another town some twenty miles distant, and had been so absent for more than two weeks prior to the meeting, and both the one last named and the remaining four had been verbally notified in fact of the time and place of the meeting, and that a county commissioner was to be voted for, but did not choose to go, and did not remain away from said meeting on account of any want of actual notice of the same.

Upon the foregoing facts, so far as they were competent, the judge was of opinion that the meeting in Gay Head was void for want of legal notice, and that the twenty-four votes cast there for the defendant should not be counted for him, and that he should be ousted from his office; but reserved the questions arising upon the foregoing facts for the determination of the full court.

J. BROWN *for the Commonwealth.*
H. M. KNOWLTON *for the defendant.*

FIELD, J.: The question here presented for decision is whether the votes cast for county commissioner at the election in Gay Head should be counted or rejected in determining who was elected county commissioner of the county of Dukes County at the annual election held Nov. 4, 1879.

The alleged illegality in the election is the want of legal notice of the meeting for election. No objection is made that the meeting was not held at the proper place, or opened at the proper hour, or kept open the requisite length of time, or that all the proceedings at the meeting were not according to law.

The Gen. Sts., c. 18, § 21,* provide that "every town meeting shall be held in pursuance of a warrant under the hands of the selectmen, directed to the constables, or some other persons appointed by the selectmen for that purpose, who shall forthwith notify such meeting in the manner prescribed by the by-laws or a vote of the town."

Meetings for the election of national, state, district and county officers, are not, strictly speaking, town meetings, but the St. of 1874, c. 376, § 21, provides that, "such meetings in towns shall be called by the selectmen in the manner ordered by the towns, and the warrant for notifying such meetings shall specify the time when the polls for the choice of the several officers shall be opened, and the hour at which the polls may be closed." † The provisions in the General Statutes for calling town meetings are substantially the same as in the Rev. Sts., c. 15, §§ 19–22, which were taken from the St. of 1785, c. 75, § 5. The provisions of the St. of 1874, c. 376, §§ 19–21, 24, for calling meetings for the election of national, state, district and county officers, are similar to those contained in the Gen. Sts., c. 7, §§ 2, 3, and the Gen. Sts., c. 8, § 7, and these were taken in substance from the Sts. of 1857, c. 311, 1841, c. 70, 1839, c. 42, and the Revised Statutes.

The Rev. Sts , c. 5, § 5, provide that, "all town meetings, for the election of representatives in the general court, shall be notified by the selectmen of each town in the manner legally established in such town for calling other town meetings," and the Rev. Sts. c. 6, § 3, require the selectmen of the several towns "in the manner directed by law for holding elections therein," to cause the inhabitants to assemble and give in their votes for representatives in Congress; and § 14 of the same chapter requires the selectmen of the several towns "in the manner prescribed by law for notifying town meetings," to cause the inhabitants to assemble and give in their votes for electors of president and vice-president.

* Now Pub. Sts., ch. 27, § 54.

† Now Pub. Sts., ch. 7, § 3.

The St. of 1795, c. 55, § 1, in regulating the election of representative in the legislature of the Commonwealth provides that "it shall be the duty of such selectmen to summon and notify such meeting in the manner there legally established for calling other town meetings," and § 2 of the same act imposes a penalty upon selectmen "who shall neglect to call meetings of the inhabitants and others privileged there to vote for the election of governor, lieutenant-governor, councillors and senators, and to give due warning of the time and place of such meetings as required by the Constitution of this Commonwealth," &c. The Constitution of the Commonwealth as originally adopted, c. 1, § 2, art. 2, required that the meeting for the election of senators and councillors should "be called by the selectmen, and warned in due course of law, at least seven days before the first Monday in April," &c.

The statutes we have cited, as well as other provisions, particularly those relating to elections to fill vacancies, all require or imply that a meeting for election must be called by a warrant issued by the selectmen, and tend to show that the provision in the St. of 1874, c. 376, § 21, that "such meetings shall be called by the selectmen in the manner ordered by the towns," means that such meetings shall be called in the same manner as town meetings, namely, by "a warrant under the hands of the selectmen, directed to the constables or some other persons appointed by the selectmen for that purpose, who shall forthwith notify such meeting in the manner prescribed by the by-laws or a vote of the town."

It is not necessary to decide this; but, if it be assumed, it does not therefore necessarily follow that the notice in this case was fatally defective, or that the election held was void. The report finds that there were no "by-laws of the town prescribing how warrants for meeting shall be served," and it does not appear that there was any vote of the town on the subject; but the notice given was posted more than seven days before the day of election in a public place, which was according to the usual custom of the town. This would be a reasonable notice for a town meeting, in the absence of any by-law or vote of the town. *Rand* v. *Wilder*, 11 Cush. 294.

The notice was signed by only a majority of the selectmen, which is not a fatal objection. *Reynolds* v. *New Salem*, 6 Met. 340. The want of the addition of the name of their office to their signatures cannot be held necessarily to render the notice void.

The notice called upon the inhabitants "to vote for government officers." There is no express provision of the statute that the warrant shall specify all the officers to be voted for. It has

been held that an article in a warrant for a town meeting calling upon the inhabitants "to choose all necessary town officers" is sufficient for the election of such officers as may lawfully be chosen by towns. *Williams* v. *Lunenburg School District*, 21 Pick. 75; *Sherman* v. *Torrey*, 99 Mass. 472.

The notice did not specify the number of representatives to be voted for, nor specifically call upon the voters to bring in their votes on one ballot for such representatives (see St. 1874, c. 376, § 24); but this does not concern the election of a county commissioner. The provision in the St. of 1874, c. 376, § 19, that "the mayor and aldermen and selectmen shall decide whether such officers shall be voted for on one ballot, or at the same time on separate ballots, and shall give notice thereof in the warrant calling the meeting," we regard as directory.

The notice was not directed to "constables or some other persons appointed by the selectmen for that purpose;" it was not served by a constable or a person appointed by the selectmen to serve it, and there was no return of service. It is unnecessary to consider whether it might not be presumed that the inhabitants of Gay Head, qualified to vote, had the same actual notice of this election as they would have had if a constable had posted the notice in the manner it was posted by the selectmen, for the facts found leave no room for presumptions. It is found as a fact, that but eight of the registered voters were absent from the meeting, and of those present, all voted for county commissioner but one; and of the eight who were not present, five had actual notice of the time and place of the meeting and that a county commissioner was to be voted for, and did not remain away from the meeting on account of any want of notice; and of the remaining three, two were absent at sea and had been absent more than two weeks prior to the meeting, and one was confined to his bed by sickness and was unable to attend the meeting. The defendant had a plurality of eight votes in all the towns in the county.

If these facts are competent, it becomes apparent that the defects in the notice or warrant and in the mode of serving it worked no injury and that the election was as fully attended as if all the provisions of the law in calling the meeting had been strictly followed. These facts are competent, unless the provisions of the statute which have been disregarded are strictly mandatory, and we are of opinion that they are not.

It is not necessary to determine whether this notice, served as it was, would be a good warrant for a town meeting. There are many reasons why defects in the call of a meeting for the election

of national, state, district and county officers should not always be followed by the same consequences as similar defects in the call for a town meeting. Town meetings are in a sense legislative assemblies, held at a time and for the transaction of business not definitely prescribed by law. The annual town meeting must indeed be held in February, March or April, but the day must be determined by the warrant, and other town meetings must be held at such time as the selectmen may order they must be held in pursuance of a warrant; the warrant must express the time and place of the meeting and the subjects to be acted upon; the selectmen must insert in the warrant all subjects which ten or more voters shall in writing request to be inserted; and if the selectmen unreasonably refuse to call a town meeting, any justice of the peace of the county, upon the application of ten or more legal voters of the town, may call such a meeting by a warrant under his hand. Gen. Sts., c. 18, §§ 20–23.

The warrant for a town meeting is, as its name imports, the warrant or authority under which the meeting is held. But the annual meeting for the election of national, state, district and county officers, is required by law to be held on a day fixed by statute. And the officers to be elected and the manner of holding the election are designated and defined by statute. The warrant for such meetings is expressly required to specify the time when the polls shall be opened and the hour at which they may be closed, and to contain the directions that the voters bring in their votes on one ballot or on separate ballots, which have been before recited; but there are no other express requirements of the statute in regard to what the warrant shall contain. The language of the statute is, that such meetings shall be called in the manner ordered by the towns, and not that every such meeting shall be held in pursuance of a warrant, as in the case of towns' meetings. The actual warrant for holding an annual election for county commissioner at Gay Head, at the time this election was held, was the Gen. Sts., c. 10, §§ 1, 6.

The main purpose of a warrant for meetings for such elections is to remind legal voters of their right and duty to vote, and of the officers to be elected, and at the same time to give them notice of the place where the election will be held, and of the hour when the polls will be opened and when they will be closed. If this election at Gay Head be declared void, there can be no new election for county commissioner at Gay Head, and the voters there will have been deprived of their votes without fault on their part, in consequence of the negligence of the selectmen of the town.

If this negligence is such that there may not have been a full, free

and fair vote, or such that the result of the election there cannot be accurately ascertained, this effect may be unavoidable, but such conclusion ought not to be reached unless the construction of the statutes clearly requires it, or the manner in which the election was called has possibly resulted in depriving some legal voter of his vote, or has influenced or rendered uncertain the result of the election; for this is an election held at the time, in the place, and for the purposes prescribed by law, and by the officers authorized by law to hold such an election. The provisions of the statutes which have been disregarded in this case, we think, are not of the essence of the thing required to be done, by complying with which jurisdiction or authority to hold an election was obtained, but they regulate the form and manner in which the meeting for an election required by law then and there to be held should be called.

It is conceded by the defendant, that the returns and certificates of election, even when made in entire conformity to law, are but *prima facie* evidence of title to an elective office, when that title is tried on an information in the nature of a *quo warranto*, and that the inquiry goes back of them for the purpose of ascertaining whether in fact the defendant has been legally elected to the office which he assumes to hold.

There may indeed be facts which a court will not investigate or consider, on the ground that public policy or the laws forbid it; but the facts proved in this case are not of that character.

The case which perhaps most nearly resembles this is *People* v. *Peck*, 11 Wend. 604; but the following cases, decided under a variety of circumstances, establish the general principles which govern the case at bar. *People* v. *Hartwell*, 12 Mich. 508; *Foster* v. *Scarff*, 15 Ohio St. 532; *State* v. *Goetze*, 22 Wis. 363; *State* v. *Jones*, 19 Ind. 356; *DuPage County*, v. *People*, 65 Ill. 360; *Cleland* v. *Porter*, 74 Ill. 76; *People* v. *Cook*, 4 Selden, 67; *People* v. *Wilson*, 62 N. Y. 186.

The result is that the election at Gay Head is not void, and that this defendant was duly elected to the office he holds.

We have no occasion to consider whether it would have changed the result we have reached, if the conduct of the selectmen in not complying with the statutory requirements for calling the meeting had been fraudulent, although the fraud had produced no effect upon the election.

Information dismissed.

OPINION OF THE JUSTICES TO THE GOVERNOR AND COUNCIL.

136 Mass. 583 (1883).

By Chief Justice MORTON, and Associate Justices, FIELD, DEVENS, W. ALLEN, C. ALLEN, COLBURN and HOLMES.

Under the Pub. Sts. c. 7, § 45, providing that the governor, with five at least of the council, shall "examine" the returns of votes, made by the city and town clerks to the secretary of the Commonwealth, under § 40, and issue his summons to such persons as appear to be chosen, the governor has no power to recount the votes.

Under the Pub. Sts. c. 7, § 26, the board of aldermen of a city, upon a proper statement in writing by ten or more qualified voters of any ward, filed with the city clerk within three days following any election, has the jurisdiction and authority to open the envelope containing the ballots thrown at the election, and recount the same, including those for the offices of sheriff and district attorney.

Under the Pub. Sts. c. 7, § 36, providing for the filing, by ten or more qualified voters of a city, of "a statement in writing that they have reason to believe that the returns of the ward officers are erroneous, specifying wherein they deem them in error," a statement that the signers have reason to believe that the returns of the ward officers are erroneous in regard to certain officers mentioned is sufficient.

On Nov. 23, 1883, the governor and council adopted an order requiring the opinion of the justices of the supreme judicial court upon the following important questions of law:

1. It being the duty of the governor and council to transmit a certificate of choice to the district attorneys and sheriffs who have been elected at any election duly held, in determining who is chosen, have the governor and council the power to examine and recount the ballots given in such elections in the several cities and towns, or either of them, in order to ascertain the true result thereof, the ballots having been sealed up and preserved according to the law by the clerks of the several cities and towns, within the counties and districts respectively, more than one person claiming an election to such office and contesting the election of another person thereto before the governor and council?

2. Have boards of aldermen of cities, upon proper statements in writing in regard to such election, the jurisdiction and authority to open the envelopes and examine the returns of the votes given in the respective cities, and recount the same, to determine the questions raised, so far as they shall relate to sheriffs and district attorneys, and alter and amend such ward returns as have been proved to be erroneous?

3. Is a statement in writing in the words following, viz.: "The undersigned, qualified voters of ward one of the city of Lawrence, hereby certify that they have reason to believe that the returns of

the ward officers of said ward of the votes cast at the annual election held on November sixth, A. D. 1883, are erroneous, and that they deem said returns to be in error in reference to the offices of sheriff and district attorney," when signed by ten or more qualified voters in each of the several wards in a city, such proper and specific "statement in writing" of errors, as to give jurisdiction and authority to the board of aldermen to make an examination and recount of such ballots, under chapter 7, section 36, of the Public Statutes?

On Nov. 27, 1883, the justices of the supreme judicial court returned the following opinion: —

To His Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts:

The justices of the supreme judicial court have taken into consideration the questions proposed to them by His Excellency the Governor and the Honorable Council, and respectfully submit the following opinion:

The answers to the questions depend upon the construction and effect of the Public Statutes, which repealed and superseded all prior statutes upon the subject.

Chapter 7 of the Public Statutes provides that, in every election for national, state, county and district officers, the officers of each ward in cities, and the selectmen of each town, shall cause all ballots given in such elections, after the same have been sorted, counted, declared, and recorded, to be secured in an envelope and sealed with a seal provided for the purpose, which envelope is to be delivered to the city or town clerk. Pub. Sts., c. 7, §§ 27–34.

The thirty-fifth section provides, that, "if within thirty days next following the day of an election, a person who received votes for any office at said election, by himself, his agent or attorney, serves upon the clerk of any city or town a statement in writing, claiming an election to such office, or declaring an intention to contest the election of any other person who has received or who may receive, a certificate of election for the same, such clerk shall retain the envelope containing the ballots thrown at such election, sealed as provided by law, subject to the order of the body to which either of said persons may claim or be held to have been elected, or until such claim is withdrawn, or such election is decided by the authority competent to determine the same."

The thirty-sixth section provides that "if within three days next following the day of any election, ten or more qualified voters of any ward file with the city clerk a statement in writing that they have reason to believe that the returns of the ward officers are erroneous, specifying wherein they deem them in error, said clerk

shall forthwith transmit such statement to the board of aldermen or the committee thereof appointed to examine the returns of said election. The board of aldermen, or their committee, shall thereupon, and within five days (Sunday excepted) next following the day of election, open the envelope and examine the ballots thrown in said ward, and determine the questions raised; they shall then again seal the envelope, either with the seal of the city or a seal provided for the purpose, and indorse upon said envelope a certificate that the same has been opened and again sealed by them in conformity to law; and the envelope, sealed as aforesaid, shall be returned to the city clerk, who, upon the certificate of the board of aldermen, or of their committee, shall alter and amend such of the ward returns as have been proved to be erroneous, and such amended returns shall stand as the true returns of the ward."

Subsequent sections of the same chapter provide that city and town clerks shall, within ten days of the day of an election for certain state, county, and district officers, including sheriffs and district attorneys, "transmit copies of the records of the votes, attested by them, certified by the mayor and aldermen or selectmen, and sealed up," to the secretary of the Commonwealth, who is, upon receiving such returned copies, to transmit them, as received, with their seals unbroken, to the governor and council, "and the governor, with five at least of the council, shall, as soon as may be, examine them;" and, in the cases of sheriffs and district attorneys, the governor is thereupon to issue a certificate of election to such persons as appear to be elected. Pub. Sts., c. 7, §§ 40–45.

The provisions of the thirty-sixth section are clear and explicit, and seem to us to admit of but one construction. They authorize and require the boards of aldermen of cities to recount the ballots cast in any ward, upon the filing of the proper statement in writing, by ten or more qualified voters of the ward, that they have reason to believe that the returns of the ward officers are erroneous.

By the statutes above cited, the governor and council are made a board to examine, as soon as may be after receiving them, the returns of votes from the cities and towns for sheriffs, district attorneys, and other officers named, and thereupon the governor is to issue certificates to such persons as, upon such examination, appear to be elected. We are unable to find in the statutes now in force any provisions which expressly or by implication authorize them to recount the ballots thrown either in cities or towns. The thirty-fifth section, which we have cited above, was intended to provide for the preservation of the ballots as evidence while any contest exists as to the election. The last clause, providing for the keeping of the ballots until "such election is decided by the au-

thority competent to determine the same," does not confer upon any board authority to recount the ballots, but merely provides for their safe keeping as evidence to be used before such body, board, or tribunal as, by other provisions of law, has the power to recount them.

In 1875, the justice of the supreme judicial court gave to the governor and council an opinion that it was competent for them to recount the ballots cast for district attorney in towns, but not those cast in cities. 117 Mass. 599. This opinion was based upon the statute of 1874, chapter 376, section 47, which provides that the clerk of a town should carefully preserve the envelope containing the ballots, "subject to the order of the legislative body to which such person claims an election, or, in other cases, of the board required by law finally to examine the returns and issue certificates of election; and in all such cases said legislative body or board may take and open said envelope and recount the ballots thus preserved." This gave the governor and council express authority to recount the ballots cast in towns for district attorney or for sheriff.

But this provision was repealed by the statute of 1876, chapter 188, and instead thereof the provisions were enacted as they are now found in the Public Statutes. This repeal revoked the authority of the governor and council to recount the ballots cast in towns.

The opinion then given, so far as it affects the right to recount such ballots, has no application under the laws now in force, but it shows that the governor and council then had, and now have, no right to recount the ballots cast in cities; and, by its course of reasoning, strongly tends to show that, under the laws as they now exist, there is no authority in the governor and council to recount the ballots cast in towns.

If a statement in writing is filed within three days of an election by ten or more voters of a ward, and it is accepted and acted upon by the board of aldermen, who make a recount, and the city clerk transmits this amended return to the secretary of the Commonwealth, it may well be doubted whether it would be competent for the governor and council to investigate the regularity of the action of the board of aldermen and city clerk, and reject the return upon the ground of some formal defect existed in the original statement in writing. But however this may be, we are of opinion that the statement in this case was sufficient.

The statute contemplates that the statement is to be made by plain people, and technical and narrow rules of construction ought not to be applied to it. It is sufficient if it specifies with reason-

able clearness in what respect the returns of the ward officers are supposed to be erroneous.

The statement of which a copy is given in the third question, states that the returns of the ward officers of the votes cast are believed to be erroneous in regard to the offices of sheriff and district attorney. Everybody would understand this to mean that there was believed to be a miscount of the votes for these officers. It is impossible in the nature of things to specify the particular errors in detail, and we are of opinion that the statement referred to was sufficient, and required the aldermen to make a recount.

From these considerations, it follows that the first question proposed to us must be answered in the negative, and the second and third questions in the affirmative.

Boston November 27, 1883.

SUPPLEMENT II.

DIGEST OF DECISIONS OF THE SUPREME JUDICIAL COURT RELATING TO INHABITANCY AND RESIDENCE.

1 Mass. to 138 Mass., Inclusive.

1. GENERAL PRINCIPLES AND RULES OF DOMICILE.
2. PARTICULAR CASES.
3. EVIDENCE UPON QUESTIONS OF DOMICILE.

1. General Principles and Rules.

Object of requiring domicile. The objects intended to be secured by the constitutional limitation of the right of suffrage to the town in which the voter has his home, were opportunity to ascertain the qualifications of the voter, and the prevention of fraud upon the public by multiplying the votes of the same person. Parker, J., *Putnam* v. *Johnson*, 10 Mass. 488, 502.

Meaning of "Inhabitant" and "Resident." The word "inhabitant" as used in the Constitution in fixing eligibility to office, and the word "resident" in the amendment fixing the qualifications of voters, are identical in meaning; and both of these expressions are equivalent to the term "domicile"; and therefore the right of voting or being elected to office is confined to the place where one has his domicile, his home, or his place of abode. *Opinion of Justices*, 5 Met. 587, 588; *Abington* v. *North Bridgewater*, 23 Pick. 170, 176; *Thorndike* v. *Boston*, 1 Met. 242, 245; *Sears* v. *Boston*, 1 Met. 250, 252; *Blanchard* v. *Stearns*, 5 Met. 298, 304; *Otis* v. *Boston*, 12 Cush. 44, 49; *Bulkley* v. *Williamstown*, 3 Gray, 493, 494; *Borland* v. *Boston*, 132 Mass. 89; *Lee* v. *Boston*, 2 Gray, 484, 490.

Definition and tests of Domicile. It is difficult to give an exact definition of habitancy. In general terms, one may be designated as an inhabitant of that place, which constitutes the principal seat

of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt, that a slight circumstance may turn the balance. In such a case, the mere declaration of the party, made in good faith, of his election to make the one place rather than the other, his home, would be sufficient to turn the scale. But it is a question of fact for the jury, to be determined from all the circumstances of the case. The election of a man to pay taxes in one town rather than another may be a good motive and justifiable reason for changing his habitancy; and if such election is followed up by corresponding acts, by which he ceases to be an inhabitant of the one, and becomes an inhabitant of the other, his object may be legally accomplished. But such an election to be taxed in one town rather than another is only one circumstance, bearing upon the question of actual habitancy, and to be taken in connection with the other circumstances, to determine the principal fact. Shaw, C. J., *Lyman* v. *Fiske*, 17 Pick. 231, 234. And see *Harvard College* v. *Gore*, 5 Pick. 375; *Makepeace* v. *Lee*, cited in 5 Pick. 378; *Thayer* v. *Boston*, 124 Mass. 102.

Same. The fact and the intention — the *factum* and *animus* — must concur in order to establish a legal domicile. *Kirkland* v. *Whately*, 4 All. 462; *Harvard College* v. *Gore*, 5 Pick. 370; *Holmes* v. *Greene*, 7 Gray, 299, 301; *Lyman* v. *Fiske*, 17 Pick. 231. The domicile of origin adheres to a person until he acquires a domicile somewhere else, and in order to effect a change of domicile, he must not only have had the intent to make his home in some other town, but he must in fact have made his home there. The intent and act must concur, and until the intent was consummated by an actual removal of his home, no change of domicile was effected. Morton, J., *Bangs* v. *Brewster*, 111 Mass. 382, 384; *Whitney* v. *Sherborn*, 12 All. 111; *Carnoe* v. *Freetown*, 9 Gray, 357; *Otis* v. *Boston*, 12 Cush. 44; *Kirkland* v. *Whately*, 4 All. 462; *Mooar* v. *Harvey*, 128 Mass. 219; *Wilson* v. *Terry*, 11 All. 206.

Same. Every person must have a domicile somewhere, and a man can have only one domicile for one purpose, at one and the same time. Every one has a domicile of origin which he retains until he acquires another; and the one thus acquired, is in like manner retained. Shaw, C. J., *Abington* v. *North Bridgewater*,

23 Pick. 170, 177; *Thorndike* v. *Boston*, 1 Met. 242; *Otis* v. *Boston*, 12 Cush. 44.

Same. The question of domicile depends not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another. Such an inquiry, therefore, involves a comparison of proofs, and in making that comparison, there are some facts, which the law deems decisive, unless controlled and counteracted by others still more stringent. The place of a man's dwelling-house is first regarded, in contradistinction to any place of business, trade or occupation. If he has more than one dwelling-house, that in which he sleeps or passes his nights, if it can be distinguished, will govern. If the dwelling-house is partly in one place and partly in another, the occupant must be deemed to dwell in that town, in which he habitually sleeps, if it can be ascertained. Shaw, C. J., *Abington* v. *North Bridgewater*, 23 Pick. 170, 178.

Same. Actual residence, that is, personal presence in a place, is one circumstance to determine the domicile, or the fact of being an inhabitant; but it is far from being conclusive. A seaman on a long voyage, and a soldier in actual service, may be respectively inhabitants of a place, though not personally present there for years. It depends, therefore, upon many other considerations, besides actual presence. Where an old resident and inhabitant, having a domicile from his birth in a particular place, goes to another place or country, the great question whether he has changed his domicile, or whether he has ceased to be an inhabitant of one place, and become an inhabitant of another, will depend mainly upon the question to be determined from all the circumstances, whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode, until some new resolution be taken to remove. If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent to return and resume the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties. Shaw, C. J., *Sears* v. *Boston*, 1 Met. 250, 251.

Same. To make domicile or residence, the fact and intent must concur. Certain maxims on the subject are well settled. These are that every person has a domicile somewhere; and no person

can have more than one domicile at the same time, for one and the same purpose. It follows from these maxims, that a man retains his domicile of origin until he changes it by acquiring another. And it is equally obvious that the acquisition of a new domicile does, at the same instant, terminate the preceding one. *Opinion of Justices*, 5 Met. 587, 589; *McDaniel* v. *King*, 5 Cush. 469.

Same. A person cannot be an inhabitant in one town for purposes of taxation, and in another for the enjoyment of political privileges or municipal rights. The being "an inhabitant" is a fact first to be fixed. A person, who is an inhabitant in one town cannot at the same time be an inhabitant of any other; and there are facts and circumstances attending every man's personal, social and relative condition, which determine in what town he is an inhabitant, and these facts and circumstances are capable of judicial proof. *Otis* v. *Boston*, 12 Cush. 44.

Same. The general rule, and for practical purposes, a fixed rule, is, that a man must have a habitation somewhere; he can have but one; and therefore in order to lose one, he must acquire another. This is the test, the practical test; and it is hardly necessary to say how important it is to have a practical rule, and a general rule. One of the fixed rules on the subject is this; that a purpose to change, unaccompanied by actual removal or change of residence, does not constitute a change of domicile. The fact and the intent must concur. The person must remove without the intention of going back. He cannot abandon one domicile without acquiring another. If he goes into another state, and returns for his family, his personal presence there, concurring with the intent, may fix his domicile there. But if he has not previously removed to the other state, he has not acquired a domicile there, or lost one here. Shaw, C J., *Bulkley* v. *Williamstown*, 3 Gray, 493, 495.

Acquisition of new Domicile. To prove a change in domicile it must be made to appear, not only that the old domicile has been abandoned, but also that a new one has been acquired; so that a domicile being once fixed will continue, notwithstanding the absence of the party, until there is a substitution of a new one. The intention to abandon, and actual residence in another place, if not accompanied with the intention of remaining there permanently, or at least for an indefinite time will not produce a change of domicile. Wilde, J., *Jennison* v. *Hapgood*, 10 Pick. 77, 98.

Same. Domicile of origin or domicile acquired remains until a new one is acquired. Native domicile is not so easily changed as acquired domicile, and more easily reverts. A man can have but one domicile at the same time for the same purpose. Change of

domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period, as upon its being without an intention to return. An intention to return, however, at a remote or indefinite period, to the former place of actual residence will not control, if the other facts which constitute domicile all give the new residence the character of a permanent home and place of abode. The intention and actual fact of residence must concur, when such residence is not in its nature temporary. There is a right of election by expressed intention, only where the facts of residence are to some extent ambiguous. Colt, J., *Hallett* v. *Bassett*, 100 Mass. 167, 170.

Same. A person cannot be said to lose his domicile or residence by leaving it with an uncertain, indefinite, half-formed purpose to take up his residence elsewhere. It would be more correct to say, that he would not lose his residence until he had gone to a new one, with a fixed purpose to remain there and not to return to his former home. Until his purpose to remain had become fixed, he could not be said to have abandoned his former residence. The domicile of a party may be considered as remaining in a place when he returns to it after a temporary absence, too short to enable him to gain a residence elsewhere; because in such case, it may be reasonably supposed that he absented himself with the intention of returning. Bigelow, J., *Worcester* v. *Wilbraham*, 13 Gray, 586, 590; *Bulkley* v. *Williamstown*, 3 Gray, 493; *Chelsea* v. *Malden*, 4 Mass. 134; *Lee* v. *Lenox*, 15 Gray, 496.

Same. A citizen of Massachusetts, removing with his family to another state, and retaining no dwelling place in Massachusetts, though retaining his place of business here, and intending to retain his domicile here, and to return at some future indefinite period of time, has no domicile in Massachusetts. *Holmes* v. *Greene*, 7 Gray, 299, *ante*, p. 407.

Same. A person may have his residence in a town, with the right to vote there, if he is remaining without intention to remove, although he may have a lawful settlement in another town to which he would be removable, under the pauper laws, in case he should become chargeable. *Putnam* v. *Johnson*, 10 Mass. 488.

To acquire new Domicile, intention to remain permanently not necessary. In order to acquire a new domicile, it is not necessary that the person should reside in the place in question with the purpose of making it his permanent home and residence; but it is sufficient if he resides there with the intention to remain for an indefinite period of time, and without any fixed or certain purpose to return to his former place of abode. *Whitney* v. *Sherborn*, 12 All. 111.

Same. One who is residing in a place with the purpose of remaining there for an indefinite period of time, and without retaining and keeping up any *animus revertendi*, or intention to return, to the former home which he has abandoned, will have his domicile in the place of his actual residence. *Wilbraham* v. *Ludlow*, 99 Mass. 587.

Same. Intention of always staying in a place is not necessary to obtain a residence or home in the place. "In this new and enterprising country it is doubtful whether one-half of the young men at the time of their emancipation fix themselves in any town with an intention of *always staying there.* They settle in a place by way of experiment, to see whether it will suit their views of business, and advancement in life, and with an intention of removing to some more advantageous position if they should be disappointed; nevertheless they have their home in their chosen abode while they remain." *Putnam* v. *Johnson*, 10 Mass. 488, 501.

Former Domicile continues until new Domicile is acquired. A domicile once acquired is presumed to continue until a subsequent change is shown. *Chicopee* v. *Whately*, 6 All. 508.

Same. If an inhabitant of a town removes to another town in the Commonwealth, not intending to remain there permanently, but with the intention of not returning to his former home, and does not so return, he loses his domicile in the former town. *Mead* v. *Boxborough*, 11 Cush. 362.

Same. Every one must have a domicile somewhere, and a domicile once existing cannot be lost by mere abandonment even when coupled with an intent to acquire a new one, but continues until a new one is in fact gained. The former domicile remains until both the intent and fact of change of actual residence to another place have concurred to establish a new domicile there. *Shaw* v. *Shaw*, 98 Mass. 158.

Residents in Territory in the Commonwealth ceded to United States are not Voters. Inhabitants of unincorporated plantations in the Commonwealth were held in 1807, not entitled to vote for state officers. *Opinion of Justices*, 3 Mass. 568.

Same. The inhabitants of a territory owned by the United States, and lying within this Commonwealth, but over which the courts of this Commonwealth have no jurisdiction, cannot vote in any state election. *Commonwealth* v. *Clary*, 8 Mass. 72, 77.

Same. Persons who reside on land purchased by, or ceded to, the United States for navy-yards, forts and arsenals, and where

there is no other reservation of jurisdiction to the state than that of a right to serve civil and criminal process on such lands, do not, by residing on such lands, acquire any elective franchise as residents of a city or town within the jurisdiction of the Commonwealth. *Opinion of Justices*, 1 Met. 580.

2. Particular Cases.

1. Absence from the state for a particular purpose, but without taking a permanent residence out of the state, was *held* not a *removal* within the meaning of the statute providing for proof of deeds where the subscribing witness had removed from the Commonwealth. *Sacket's Case* (1804), 1 Mass. 58.

2. A person having his permanent home in one town, and being legally qualified to vote in such town, is not disqualified by a temporary absence for ten weeks in another town to perform work, although he may in such latter town have been admitted to vote. *Lincoln* v. *Hapgood*, 11 Mass. 350.

3. A person who with his family resided in Roxbury was appointed, Oct. 27, 1811, clerk of the courts for the county of Norfolk, and on the next day went to Dedham, the county seat, to perform his duties as clerk, leaving his family and household effects in Roxbury until November 12, when he removed his family to Dedham. In the mean time, he had boarded in a public house in Dedham, but had engaged a house there to be occupied from November 12. He spent some nights during the interval in Dedham and some with his family in Roxbury, having his washing and other domestic services performed in his family at Roxbury. On June 24, 1812, he ceased to be clerk of the courts, and immediately afterwards opened a law office in Roxbury, leaving his family in Dedham, and frequently going to Roxbury and returning to Dedham at night. It was *held* that he remained an inhabitant of Roxbury until he removed his family to Dedham, Nov. 12, 1811, and therefore had not been an inhabitant of Dedham for one year next preceding the election Nov. 2, 1812, and was not entitled to vote in that town. *Williams* v. *Whiting*, 11 Mass. 424.

4. A citizen of Vermont, having resided in a town in Massachusetts ten years and having paid taxes in it for more than five years, although he left his wife and children upon his farm in Vermont, occasionally visiting them there, but not considering it his home, and keeping them there only until he could conveniently remove them, was *held* to have acquired a settlement in such town in Massachusetts, within the meaning of the pauper laws. *Cambridge* v. *Charlestown*, 13 Mass. 501.

5. Where a person, having lived many years in Waltham, purchased and furnished a house in Boston, and afterwards with his family spent his summers at his house in Waltham, where he continued to pay his taxes, and his winters at his house in Boston, and died while so residing in Boston, it was *held* that at the time of death he was an inhabitant of Waltham, and that his will should be probated under the statute, in the county of Middlesex in which Waltham is situated. *Harvard College* v. *Gore*, 5 Pick. 370.

6. Where a person lived in a town nine years and four months, and then absconded and never returned, but his wife remained there eight months longer, it was *held* that he had not resided in such town ten years, actually or constructively, and therefore had not gained a settlement there under the pauper laws. *Athol* v. *Watertown*, 7 Pick. 42.

7. A testator having his domicile in Petersham, Massachusetts, and being the owner of a farm there upon which he and his family resided, became financially embarrassed and left the Commonwealth, never returning. He left his wife and daughter on the farm, who continued to live there with his son, who hired the farm of him, and charged to him their board. After leaving the Commonwealth he led a wandering life, but spent most of his time at Lunenburg, Vermont, his object being to take care of his lands there; he never kept house there, but boarded with a person with whom he had resided occasionally for several years. In his journal in which he kept a memorandum of his expenses and of his journeys from place to place, he never spoke of any place as his home. In his letters, he spoke of sustaining actions here in the federal court, "as he has removed his habitancy from Massachusetts," "as he has become an inhabitant of Vermont"; and in speaking of an action brought against him in Massachusetts, he expresses his opinion that the service is insufficient, "as Petersham is not his last and usual place of abode." In deeds and in his will, executed in New Hampshire, he styled himself of Petersham. His will was proved in Massachusetts originally, and in the probate he was styled, "late of Petersham," as he was also in the subsequent proceedings in the probate courts here and in Vermont; and he was so styled in deeds made by the executor. He died in New Hampshire while there on business. It was *held* that these facts did not prove a change of domicile. *Jennison* v. *Hapgood*, 10 Pick. 77.

8. On a libel for divorce by the wife, it appeared that the husband's domicile of origin was in Uxbridge, in the county of Worcester; that he married the libellant in 1810, and removed with her to

Savannah, Georgia, where he engaged in business, and continued to reside with his wife and family until 1821, except in the summer months which he usually spent in the Northern States; that in 1821 he broke up his establishment in Savannah and returned to his father's at Uxbridge; that after a few months' residence there, he established his family at Providence, Rhode Island, where they remained until 1825, while he passed the summer months with them each year, but still continued to carry on his business in Savannah; that in 1825 he broke up housekeeping in Providence and separated from his wife, and from that time continued to keep up a household establishment in Uxbridge on the farm which was his father's and which was mortgaged to him before the death of his father in 1825; that he resided there during the summer months, employing housekeepers and domestics and superintending the management of the farm, but continuing to carry on business the rest of the year in Savannah; and that the wife came from Providence into the county of Worcester to reside in September, 1830, and soon after filed her libel. It was *held* that her husband was domiciled in Savannah from 1810 to 1821, in Providence from 1821 to 1825, and in Uxbridge since that date; that the domicile of the wife followed that of her husband; and that the court sitting for the county of Worcester had jurisdiction of the libel. *Greene* v. *Greene*, 11 Pick. 410. And see *Harteau* v. *Harteau*, 14 Pick. 181.

9. Where the boundary line between the towns of Randolph and North Bridgewater passed through a dwelling-house in such a direction as that that portion of the house which was in North Bridgewater was sufficient in itself to constitute a habitation, while the portion in Randolph was insufficient for that purpose, it was *held* that a person occupying such house acquired a domicile in North Bridgewater.

It seems, that if, in such case, the line had divided the house more equally, the fact that the occupant had habitually slept in that part which was in North Bridgewater would be a preponderating circumstance to show that he was domiciled in that town, and in the absence of other evidence, would be decisive of the question. *Abington* v. *North Bridgewater*, 23 Pick. 170. And see *Chenery* v. *Waltham*, 8 Cush. 327.

10. A citizen of Boston who had been at school in the city of Edinburgh when a boy, and formed a predilection for that place as a residence, and had expressed a determination to reside there, if he ever should have the means of so doing, removed with his family to that city in 1836, declaring at the time of his departure that he intended to reside abroad, and that if he should return to the United States, he should not live in Boston. He resided in Edin-

burgh and the vicinity as a housekeeper, taking a lease of an estate for a term of years, and endeavored to engage an American to enter his family for two years as instructor of his children. Before he left Boston he made a contract for the sale of his mansion house and furniture there, but shortly afterwards procured said contract to be annulled (assigning as his reason therefor, that in case of his death in Europe, his wife might wish to return to Boston) and let his house and furniture to a tenant. *Held* that he had changed his domicile, and was not liable to taxation as an inhabitant of Boston, in 1837. *Thorndike* v. *Boston*, 1 Met. 242.

11. A native inhabitant of Boston, intending to reside in France with his family, departed for that country in June, 1836, and was followed by his family about three months afterwards. His dwelling-house and furniture were leased for a year, and he hired a house for a year in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for his return. He returned in about sixteen months, and his family, in about nine months afterwards. *Held*, that he continued to be an inhabitant of Boston, and that he was rightly taxed there, during his absence, for his person and personal property. *Sears* v. *Boston*, 1 Met. 250.

12. In an action brought by one town against another for the support of a pauper and his family, evidence that the pauper left his former home and came to the defendant town with the intention of removing his family there as soon as practicable, that he boarded and worked there for ten years, and paid taxes there five years of the ten, and that a year after he came, his family removed there and continued to reside with him for the rest of the ten years, when they all removed to the plaintiff town, — is sufficient to warrant the jury in finding that the pauper had gained a settlement for himself and family in the defendant town. *Fitchburg* v. *Winchendon*, 4 Cush. 190.

The plaintiff, who was a native of Boston, removed to New York in 1828, where he resided until 1840, at which time he returned to Boston and remained an inmate of his father's family until 1848, when his father died. He then took rooms at a hotel, and remained in Boston employed as executor of his father's will, until April 5, 1849. During this whole period he frequently expressed an intention of leaving Boston and removing to Europe or New York. On April 5, 1849, he went to New York, intending to sail for Europe, and either to fix his residence in Paris or return to New York. He did not sail from New York but returned to Boston on May 7, and sailed from that city June 6, 1849. In June, 1850, he returned and established his residence at Newport. *Held* he was an inhabi-

tant of Boston on May 1, 1849, for the purpose of taxation. *Otis* v. *Boston*, 12 Cush. 44.

13. The plaintiff owned dwelling-houses in Brookline, in Boston and in Beverly. He usually resided in Brookline about seven months of each year, from sometime in April to November (except a few weeks in midsummer spent at his house in Beverly), when he closed that house and removed to Boston until the following April. In April, 1850, the usual preparations were made to close the house in Boston and remove to Brookline, but from illness he was not able to go personally until sometime in May. On April 28, he informed the assessors of Brookline of the cause of his detention in Boston, and that he desired to continue a citizen of Brookline and taxable there, where for many years he had been taxed, and had exercised all municipal rights and privileges. *Held*, that although actually in Boston on May 1, 1850, he was not rightfully taxed there upon his poll and personal estate. *Cabot* v. *Boston*, 12 Cush. 52.

14. The plaintiff was on Jan. 1, 1853, living in Boston in a house owned by him. But for at least twenty years previously to that time, he owned a house in Brookline, where he spent the greater part of each year, and for the whole of that period he had been constantly taxed for his poll and personal property in that town, and had voted and exercised all his rights of citizenship there. He moved into Boston in November, 1852, but with an intention to remain there only for a limited period; and in pursuance of that intention, returned in the month of April ensuing to his estate in Brookline. He acted himself, and was treated by others as an inhabitant of that town. These facts, upon perfectly well settled principles, are conclusive as to the place of his domicile and inhabitancy. As he moved into Boston only for a temporary purpose, and for a limited period, and returned to Brookline within a few months, when that purpose was accomplished, his domicile was not changed, and he continued all the time to be an inhabitant of Brookline. He did not, therefore, within the meaning of the statute, "have his residence in the city of Boston on the first day of January," 1853; and therefore the assessment of a tax upon his poll and personal property there for that year was without warrant or authority of law. Merrick, J., *Lee* v. *Boston*, 2 Gray, 484, 493.

15. An inhabitant of Providence, being out of health, gave up business there and removed to Freetown with the intention of remaining there through the summer, and returning to Providence in the autumn to reside and do business there. The next autumn his health was restored, but not finding satisfactory business in Providence, he remained in Freetown until the following March, when

he entered into business elsewhere, and intended, as soon as he could make arrangements, to remove to Cumberland, R. I, to reside, and made a contract for the removal of his furniture to that place as soon as possible. On the 1st day of May he put it on board a vessel, and a few days after personally removed to Cumberland. *Held*, that, being actually in Freetown May 1st, and having no domicile for taxation elsewhere, he was rightly taxed there on said 1st day of May. *Carnoe* v. *Freetown*, 9 Gray, 357.

16. A man who was born and resided during his childhood in Vermont, afterwards lived in New York for five years next preceding his coming of age, then spent some months at his former home in Vermont in search of employment, and afterwards for the same purpose went to St. Louis, and obtained employment as a clerk, but under no contract for any fixed length of time, and there became engaged to marry a woman residing at Roxbury, and came to Massachusetts in March to fulfil his engagement, without intending to make Roxbury his residence, hired a house in Brookline at a rent beginning on the 1st day of April, and put into it servants and furniture, and his own and his betrothed wife's movable property. They were married at Roxbury on the 9th day of April, and immediately took a wedding tour with an intention of returning to Roxbury, and on the 2d day of May returned to the house in Brookline and resided there. *Held* that his domicile was in Brookline on the 1st day of May. *Williams* v. *Roxbury*, 12 Gray, 21.

17. If a debtor is absent from and resides out of the Commonwealth, retaining no dwelling-house or boarding-place here, though intending to return at some future indefinite time, he has no domicile here, and the time of his absence is to be deducted from the period of limitation of actions against him under the statute of limitations. *Sleeper* v. *Paige*, 15 Gray, 349.

18. An inhabitant of a town within the Commonwealth, who before the first day of May has left the Commonwealth with the intention of never returning, and of taking up his abode in a town in another state, and is in May in another town in that state, is not taxable in the Commonwealth on May 1st, although he has not yet acquired a domicile in the other state. *Briggs* v. *Rochester*, 16 Gray, 337. This case, however, at least as regards the law of taxation, was practically overruled by *Borland* v. *Boston*, 132 Mass. 89.

19. The plaintiff lived in Boston, and afterwards went to New Orleans where he took up his residence, went into business, became permanently fixed as a merchant, and has had no other place of business since. He married at the South, had children, came to Boston with them intending to return, bought a house, commenced housekeeping and sent his children to the public schools. He was

in the habit of coming to Boston every summer and remaining there and in the vicinity for a few months. He left his family in Boston, for the benefit of the children's health, for two years, returned, himself to his business in New Orleans, always styled himself as of New Orleans, exercised the rights and performed the duties of a citizen there, and in no other place, and intended that his domicile should be there. *Held*, that the court ought not to set aside a verdict, which found upon proof of the above facts, that his domicile was in New Orleans. *Cochrane* v. *Boston*, 4 All. 477.

20. If a minor leaves the domicile of his origin with the consent of his guardian and lives for two consecutive years exclusively in another town, considering it as his home, with no definite intent on the part of his guardian to cause him to return, he acquires a new domicile in the latter place, and his property is properly taxable there. *Kirkland* v. *Whately*, 4 All. 462.

21. The plaintiff, before the 1st day of May had determined to abandon his domicile in Massachusetts, and to take up his permanent residence in Pennsylvania, and in pursuance of that determination before the 1st day of May, he actually abandoned Massachusetts, and passed into Connecticut, where he remained until after the 1st day of May, and in a few days proceeded to Pennsylvania, where he afterwards continued to reside. *Held* that he was not taxable as an inhabitant here on the 1st day of May. *Colton* v. *Longmeadow*, 12 All. 598. See on the authority of this case *Borland* v. *Boston*, 132 Mass. 89.

22. Evidence that a police officer of the town of Newton sometimes while on duty slept in the police station there; that he had a room in Newton where he sometimes slept, and also had another room there at the house of his brother where he kept his clothes, and that he claimed to be an inhabitant of Newton, — is sufficient to warrant the jury in finding that he was an inhabitant of that town, although he worked and boarded in the town of Watertown, and was a police officer of that town. *Commonwealth* v. *Kelleher*, 115 Mass. 103.

23. In an action against the city of Boston to recover the amount of a tax assessed on the personal property of the plaintiff on May 1, 1876, and paid under protest, there was evidence that until 1869 the plaintiff had lived in Boston for many years with his family in a house owned by him; that, in that year, being dissatisfied with the amount of tax there assessed on his personal property, he gave notice to the assessors that he had removed his residence to Lancaster, where at the time he owned the place on which he was born, and had built a house, in which he had lived with his family from June to October or November in each

year; that, after giving the notice he continued to live there, as before, for a part of each year, voting and being taxed only in that town, taking part in town meetings, and occasionally serving on town committees. *Held* that the jury would be warranted in finding that the plaintiff was not legally taxable as an inhabitant in Boston, May 1, 1876, although he removed to lessen his taxation, and on the day the tax was assessed he was with his family living in his house in Boston. *Held also*, that a request by the defendant, for a ruling that the plaintiff was *prima facie* an inhabitant of Boston, and there resident, if he and his family were on May 1st living in a house of his own in the same way in which he had lived during three years in which he admitted that he had been a taxable inhabitant of Boston, — was properly refused. *Held also*, that if a person has a dwelling-house in each of two towns in the Commonwealth, he may have his home in one town for the purpose of taxation, although he spends the greater portion of the year in the other, and is there on the 1st day of May. *Thayer* v. *Boston*, 124 Mass. 132.

24. In an action against the city of Boston to recover the amount of a tax assessed on the personal property of the plaintiff, May 1, 1876, and paid under protest, there was evidence that he acquired a domicile in Brookline which he retained until 1870; that in that year his father, with whom he had previously lived, moved to Nahant and died in 1874; that the plaintiff since 1870 had lived for some time each summer in a small house in Nahant, with his brothers and sisters, which was owned by him and them, after his father's death; that in 1872, his wife acquired a large estate in Boston with a house on it; that he had bought much land about it and had since inhabited it exclusively except when at Nahant; that in this house were all his furniture, books and pictures. The plaintiff testified that when he left Brookline he intended to make Nahant his home, and that he never intended to make Boston his home. *Held*, that there was evidence to warrant the verdict that on May 1, 1876, he was a resident of Boston and there taxable. *Wright* v. *Boston*, 126 Mass. 161.

25. The plaintiff, having his domicile in Boston, left that city in 1876 with his family, to reside in Europe for an indefinite length of time, with the fixed purpose never to return to Boston, as a place of residence, and to make some place other than Boston his residence when he should return; and while in Europe before May 1, 1877, fixed upon a place of residence in another state, but remained in Europe until 1879. *Held* that he retained his domicile in Boston for the purposes of taxation on May 1, 1877. *Borland* v. *Boston*, 132 Mass. 89.

26. *Sailors.* Under the pauper laws of the Commonwealth, a mariner making his home in any town for more than a year, acquired a settlement in such town, although following the business of his profession therefrom. *Abington* v. *Boston*, 4 Mass. 312.

27. If a seaman, without family or property, sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicile elsewhere, he retains his domicile of origin. Shaw, C. J., *Thorndike* v. *Boston*, 1 Met. 242, 246.

28. In an action for a debt, begun twelve years after the debt accrued, these facts appeared: The defendant, a sailor, was born and had his domicile in Barnstable, and was there residing with his wife and children, six years before the accruing of the debt, when he went alone to California, remained there two years, then returned, and lived in Barnstable during the other four years, except one interval of fourteen or fifteen months when he was on a voyage. The family was then broken up by the insanity of his wife, who was removed by legal commitment, as a resident of Barnstable, to a hospital in another place, where she died two years afterwards, while he was at sea; the children were put at school in a different part of Barnstable; and all his furniture was disposed of, except what was removed to a bedroom in his brother's house in Barnstable, which for the twelve years ensuing was always kept for his use when he was in the town, and at other times as a spare room, and was used by him when there except when he stayed in the neighboring house of his father. During these twelve years, he was absent from Barnstable most of the time, on foreign or coastwise voyages (one of them lasting eighteen months); — in New York, in Boston, and in the "oil regions," — but he returned to Barnstable at intervals for short visits, and once (about the middle of the period) stayed there an entire year. For the first four of the twelve years, except six months when he was on a voyage, he lived in New York; and during the last two of the four he visited Barnstable only twice a year. In the last half of the twelve there were three successive years, the first of which he passed as a pilot between New York and Boston; the second as a watchman in New York; and the third in the oil regions. During the sixteen months immediately preceding the end of the twelve years and the beginning of the action he was "in Barnstable and in Boston." There was no evidence that he had any house, furniture or property of a permanent character elsewhere than in Barnstable, during the whole period; when his wife died, her remains were brought to Barnstable for burial; and he testified that his intention always was to retain

Barnstable as his home and to return to it. But he testified also, that when he went to New York and to the oil regions, "he went looking for business, and intended to remain as long as he had business"; and that he paid no poll tax in Barnstable, and voted but once there, during the twelve years; though he testified further that neither did he pay a tax or vote elsewhere. *Held* that his domicile was in Barnstable for such a length of time after the debt accrued that the statute of limitations was a bar to the action. *Hallet* v. *Bassett*, 100 Mass. 167.

29. A master mariner, whose domicile of origin was in Brewster, left Brewster in 1867 and went to sea with his wife, intending to make his home in Orleans. In pursuance of this intent, he in 1868 sent his wife to Orleans, where she boarded at her father's house, and in July, 1869, he arrived in Orleans himself. *Held* that in May, 1869, his domicile was in Orleans. *Bangs* v. *Brewster*, 111 Mass. 382.

30. *Soldiers.* A person while in the military service, being in all matters not involved in his military duties *sui juris*, may be capable of changing his domicile to any place he sees fit; and where a person, having a domicile in Lawrence, enlisted in the army in 1862, and in 1864 was detailed for duty in Washington, continuing in that duty until 1869, and then was appointed clerk in the Treasury Department there, which office he continued to hold, actually living since 1864 in Washington, with short occasional absences, not paying taxes or voting in Lawrence after 1862, it was *held* that the evidence was properly submitted to the jury on the question whether he had changed his domicile to Washington, and their finding that he had so changed his domicile will not be set aside by the court. *Mooar* v. *Harvey*, 128 Mass. 219.

31. *Student's.* A student at a college does not change his domicile by his occasional residence at the college for the purpose of study. *Granby* v. *Amherst*, 7 Mass. 1.

32. But where the student, being of age, and having become emancipated from his father's family, is residing at the college or seminary for the purpose of study, and has left his father's home, he may become a resident of such place, and so qualified to vote there, although it may not be his expectation to remain there forever. *Putnam* v. *Johnson*, 10 Mass. 488.

33. The mere facts that a student, who has a domicile in one town, resides at a public institution in another town for the sole purpose of obtaining an education, and that he has his means of support from another place, do not constitute a test of his right to vote, and his liability to be taxed in the latter town. He obtains this right and incurs this liability only by a change of domicile;

and the question whether he has changed his domicile is to be decided by all the circumstances of the case. *Opinion of Justices*, 5 Met. 587.

34. *Laborers.* A person legally capable of choosing or changing his domicile, who abandons his home, and thenceforth wanders from town to town, working as a day laborer, "with no purpose in view, and with no opinions, desires, or intentions, in relation to residence, except to have a home wherever he works," ceases to have a continuing domicile, for the purpose of acquiring a settlement in the town where the home is which he so abandons. In such case he had in each successive town where he lived as a laborer, a home and domicile so long as he remained there. The case is one where a person has abandoned his former dwelling place, either with no intention of returning, or at the most with such vague, indefinite and remote purposes in this respect that they would not prevent him from readily acquiring a new domicile wherever he might go. The person was a day laborer without family, separated by judicial decree from his wife. Such a man, so situated, when he is laboring in one town with no other intention as to residence, except to have a home wherever he works, may well be deemed to live there with the purpose of remaining for an indefinite period of time, and thus to have there all the home he has anywhere, as much of a domicile as such a wanderer can have. *Wilbraham* v. *Ludlow*, 99 Mass. 587.

35. A person, however, who was an inhabitant of New Jersey, and came into Massachusetts with his wife to seek employment, intending if he found it to reside here permanently, and not finding it, returned in six weeks to New Jersey, leaving his wife here because he had no means to pay her travelling expenses and maintain her, was *held* not to have acquired a domicile in Massachusetts. *Ross* v. *Ross*, 103 Mass. 575.

3. Evidence on Issue of Inhabitancy or Domicile.

Evidence of acts. After proof of a man's declaration of his intention to leave a town, evidence is competent, upon the question of his domicile, to show that he was not in such town afterwards, except occasionally and for short visits. *Wilson* v. *Terry*, 11 All. 206.

Same. Upon an issue whether the plaintiff had removed his residence from Hatfield to Northampton in good faith, so as to be no longer taxable in the former place; the fact that he was not taxed in Northampton, and all his acts to prevent a disclosure or discovery of his residence there by the assessors of that town,—are admis-

sible, as bearing upon the good faith of the plaintiff in removing from Hatfield to that town. *Draper* v. *Hatfield*, 124 Mass. 53.

Same. On an issue regarding the plaintiff's domicile, it is competent for him to show any acts of habitancy in the place in which he claims a residence, such as residence in that place, paying taxes, voting, attending town meetings and taking part in the discussions. But a private conversation or discussion as to town affairs is not an act of habitancy, and, like any other declaration not accompanying an act which may be given in evidence, is not admissible in his favor. *Weld* v. *Boston*, 126 Mass. 166.

Act of Town recognizing person as a Resident. In an action by one town against another to recover expenses incurred in the support of a pauper, it was *held* that a notification addressed to the pauper by an inhabitant of a third town, warning him to attend a district school meeting therein, was competent for the purpose of proving that the pauper resided at that time in such third town, it being testified by such inhabitant that he delivered the notification to the pauper. The proof was of an act done, recognizing the pauper as an inhabitant, and as such, was competent proof, among other facts, upon the point of inhabitancy. So the fact that one's name has been placed on the list of voters, has been admitted for this purpose, although it is the act of other persons. The evidence in question is similar; it is an act of the officers of the town, recognizing the individual as an inhabitant, and acting towards him and with him as such. The weight of such circumstance would, of course, be for the jury, and if standing alone and unconnected with other circumstances, would probably be considered as very slight. *West Boylston* v. *Sterling*, 17 Pick. 126.

Same. Taxing person in Town. But the fact that a person was taxed in the town to which he has removed, in the absence of proof that it was done at his request, is not competent evidence to show that he did not continue to be taxable as an inhabitant in the town of his former residence. Such evidence would have no more legal tendency to prove that he was not taxable in the town of his former residence, than the mere fact that he was taxed in such town would have to prove that he was not taxable in the town to which he claimed to have removed. *Mead* v. *Bozborough*, 11 Cush. 362.

Same. Hiring out Pauper. Town records of votes to hire out a person and take his wages for support of his family, and "to vendue the poor," followed by the record of the bidding off of his children, are admissions that such person had his settlement in the

town, which are binding upon the town, in an action involving such person's settlement. *West Bridgewater* v. *Wareham*, 138 Mass. 305.

Same. Putting name on Voting-List. Evidence that the selectmen of a town decided that a person taxed there was an inhabitant, and put his name upon the voting-list, is not admissible for the purpose of showing that his domicile was in that town, without showing that they did it at his request. *Fisk* v. *Chester*, 8 Gray, 506.

Same. So a voting-list of a town, without evidence that a person's name was placed thereon at his request, and a tax list with a memorandum of "paid" against his name, are inadmissible in his favor to show that his domicile was in that town. *Sewall* v. *Sewall*, 122 Mass. 156.

Holding of Town Office in Town competent Evidence on question of Residence. It was competent for the plaintiff, with a view to show that the purpose he had formed of abandoning his former domicile had been carried into effect, to prove that he was still residing in the place to which he claimed to have removed his residence, and to exclude any inference that he had gone there for a temporary object, and with the intent to return after that object should have been attained. To this end he might show that he was a highway surveyor in the latter town, or had engaged in any pursuit or calling indicating the design and purpose of making such town a place of permanent residence. *Cole* v. *Cheshire*, 1 Gray, 441.

Mere intent insufficient to prove Residence. Mere bald intent, unaided by other proof, will not establish domicile. The *factum* and *animus* must concur in order to establish a domicile. The latter may be inferred from proof of the former. But evidence of a mere intent cannot establish the fact of domicile. *Holmes* v. *Greene*, 7 Gray, 299.

Intent a Question of Fact. And upon the issue of a change of domicile, the question of the person's intent, when his testimony is contradicted by other evidence, is one of fact for the jury. *Mooar* v. *Harvey*, 128 Mass. 219.

Declaration of Intention. Declarations of a person, which can be fairly construed as expressive of his intention in leaving a town, or coming to another, or of his purpose to regard one or the other as his fixed place of residence, if such declarations accompany an act which they explain or qualify, are competent evidence in an issue of such person's domicile. *Monson* v. *Palmer*, 8 All. 551.

Same. The rule is that declarations which accompany and give character to an act which is itself competent evidence, are admissible on the ground that they are parts of the act or *res gestæ*. But declarations which do not accompany the act of removal, even if they are statements of his future intentions as to his residence, are inadmissible. Morton, J., *Brookfield* v. *Warren*, 128 Mass. 287.

Same. A party to a suit involving the question of his domicile, at a particular time, may testify to the intent with which he removed from one town to another shortly before, and returned soon after that time. *Fisk* v. *Chester*, 8 Gray, 506.

Same. Upon the issue whether the plaintiff had removed from a town, with the intention of residing in another town, his declarations regarding his intention to reside in such other town, made in a negotiation for a place of residence or boarding place, are competent evidence. This negotiation, with the declaration of purpose and intent, which not so much accompanied, as made part of it, was a fact competent to be proved. Whether the negotiation was successful, whether it ripened into a contract or not, might affect the weight, but not the competency of the evidence. Such declarations are, within the strictest rule, part of the *res gestæ*, qualifying and giving character to the principal thing done. *Cole* v. *Cheshire*, 1 Gray, 441.

Same. On an issue whether a person who has left the state has changed his residence, he may testify as to his intent, and his declaration of that intent, on leaving the state. *Reeder* v. *Holcomb*, 105 Mass. 93.

Same. But declarations as to his intention, made *after* the removal, not being part of the *res gestæ* are inadmissible. If made at the same time with the act, they may be considered as a part of the *res gestæ*, and so admissible. But declarations, not made by a party while doing any act, being merely a recital of past transactions and past purposes, are not admissible. They are not explanatory of an act about to be done, nor made in reference to any future action; they are merely declarations in relation to a past transaction. *Salem* v. *Lynn*, 13 Met. 544.

Same. Upon an issue whether a person has removed his residence before the 1st day of May; evidence of his declarations, made before the alleged removal, of his intention to remove and make his home elsewhere, are admissible as part of the *res gestæ*. They were made in the ordinary course of business, and in relation to his removal; and they were made to the owner of the house in which he was at the time residing. His giving notice of his intended removal is to be considered an act, which he might prove in any case in which it became material; and if so, all that he said

explanatory of his intention in relation to his removal is admissible in evidence. *Kilbourn* v. *Bennett*, 3 Met. 199.

Same. In an action to try the question whether the plaintiff, who had left the country with his family, was liable afterwards to be taxed as an inhabitant of the place of his former residence, a letter from him to his agent in that place, expressing his intention to reside abroad permanently is admissible in evidence, if written before he knew that a tax had been assessed upon him, though written after the assessment. Otherwise, it seems, if such letter was written after he knew that he was taxed. *Thorndike* v. *Boston*, 1 Met. 242.

Same. A man's declarations as to the place of his residence, and his designation thereof in his will, are competent evidence after his death, upon the question of his domicile at a time shortly after the making of the declarations and of the will. *Wilson* v. *Terry*, 9 All. 214; *Ward* v. *Oxford*, 8 Pick. 476; *Salem* v. *Lynn*, 13 Met. 545.

Same. In an action against the selectmen of a town for refusing to put the plaintiff's name upon the list of voters, and rejecting his vote, the plaintiff may prove his own statements relating to his residence, made to the selectmen before offering his vote, not under oath, for the purpose of furnishing to them evidence of his having the legal qualifications of a voter; and he may testify to his own intention in leaving the town for a prolonged absence, previously to the time of the acts complained of. *Lombard* v. *Oliver*, 7 All. 155, *ante*, p. 425.

Declarations made in party's favor. On the issue whether a party to a suit had his domicile in a certain city on the 1st day of May, his declarations as to his residence in a letter by him to the assessors of the city, in reply to a circular sent to him by them; deeds in which he was grantor, describing him as of another place, (one of which was to the city as grantee); his will, in which he was described as in the deeds; and the will of his father, in which he was so described, are all inadmissible in his favor. *Wright* v. *Boston*, 126 Mass. 161; *Weld* v. *Boston*, Ib. 166.

Declarations admissible against him. But deeds to such person as grantee, describing him as resident in the defendant city, are admissible against him. His acceptance of such deeds without objection was an implied admission of the correctness of the recitals. Though of little weight, the evidence was competent. *Weld* v. *Boston*, 126 Mass. 166.

Declarations in Deeds and Wills. — Upon the question whether a pauper had derived a settlement in Oxford from his grandfather

through his father, it was *held* that copies of a deed executed by the grandfather in 1754, in which he was described as being of Oxford, and of his last will, made in 1758, in which he was described as "now resident in Oxford," were admissible evidence to prove that the grandfather gained a settlement in Oxford under the Provincial Statutes. *Ward* v. *Oxford*, 8 Pick. 476 (1829).

Held also, that evidence proving that the grandfather, for a long time before 1754, had a settlement in the town of Sutton, and that afterwards for years previous to 1784, the father of the pauper was supported as a pauper by Sutton, was admissible to rebut the presumption arising from the description of the grandfather in the deed and will. *Ib.*

Statements in Deeds and Town Records. — In an indenture of partition of lands in 1744, among the heirs of one deceased in 1742, a description of one parcel as "fifty-nine acres of land lying in Scituate, being part of the homestead of said deceased," is no evidence of his having had a dwelling in Scituate in 1695. *Hingham* v. *South Scituate*, 7 Gray, 229.

Same. — Grants of land are admissible in evidence as circumstances tending to show that the grantee at their respective dates, dwelt in that part of the town in which the land was. *Ib.*

Same. — A description in a town record of land laid out in 1696, as "adjoining to the fence of Curtis' home pasture," is admissible, against a town subsequently created out of part of the town, to prove that Curtis then dwelt in that part of the town in which the land was. *Ib.*

Same. Tax-list. — A tax-list, made by the assessors of the town, merely for the assessment and collection of a tax, containing the name of the person whose domicile is in question, is not competent evidence, in the absence of proof that his name was placed upon it at his request. *Sewall* v. *Sewall*, 122 Mass. 156; *Mead* v. *Boxborough*, 11 Cush. 362; *Commonwealth* v. *Heffron*, 102 Mass. 148.

Same. Record of Marriage. — On an issue between two towns whether a pauper's husband had resided in the defendant town from 1837 to 1845, a certified copy from the town clerk's records of another town purporting to be the copy of the marriage certificate made in April, 1837, certifying that the magistrate joined the pauper's husband and a former wife in marriage, May 24, 1836, and describing the husband as of the defendant town, was admitted as *prima facie* evidence that the husband's residence was in that town on the day named, but not of his residence there before that date. *Shutesbury* v. *Hadley*, 133 Mass. 242.

SUPPLEMENT III.

MESSAGE OF GOVERNOR ANDREW TO THE SENATE, APRIL 7, 1862, VETOING THE ACT OF 1862, ENTITLED "AN ACT TO DIVIDE THE COMMONWEALTH INTO DISTRICTS FOR THE CHOICE OF REPRESENTATIVES IN THE CONGRESS OF THE UNITED STATES," REQUIRING THE PEOPLE OF EACH DISTRICT TO LIMIT THEIR CHOICE OF SUCH REPRESENTATIVE TO AN INHABITANT OF THE DISTRICT.

Representative in Congress. Qualifications fixed by National Constitution. The qualifications of representatives in Congress are prescribed by the Constitution of the United States, and no state can add to, or take from, the qualifications so prescribed.

Same. Residence in District not required. An act of the legislature, requiring the people of each congressional district to confine their choice of representative in Congress to an inhabitant of the district, is unconstitutional, as no such restriction is imposed by the Constitution of the United States, in prescribing the qualifications of representatives.

The act of 1862, afterwards enacted as chapter 226 of the acts of that year, divided the Commonwealth into districts for the election of representatives in Congress, and provided (section 1); "For the purpose of electing representatives in the thirty-eighth Congress of the United States, and in each subsequent congress, until otherwise provided by law, the Commonwealth shall be divided into ten districts, each of which shall elect one representative, *being an inhabitant of the same*, in the manner now provided by law."

When this bill was laid before the governor, for his revisal, he returned it to the senate, where it originated, with his objections thereto expressed in the following message: —

A clause contained in the bill which originated in the senate and is entitled, "*An Act to divide the Commonwealth into districts for the choice of representatives in the Congress of the United States*," — requiring the people of each congressional district to limit their choice for representative in Congress, to an inhabitant of the district, — compels me, with much reluctance, to return the bill to the honorable senate, for its revision. And in order to present with clearness and precision the reasons which forbid the executive signature to the bill, I beg to call attention, at the out-

set, to all the language of the Constitution of the United States which bears upon the subject.

Constitution of the United States, Article 1, Section 2.

"2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

Constitution of the United States, Article 1, Section 4.

"1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state, by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators."

Congress, in the exercise of its power created by the 4th section of the 1st article above cited, to "make or alter such regulations" concerning "the time, places, and manner of holding elections for * * * representatives" (which were originally left to "be prescribed in each state, by the legislature thereof"), passed, in the year 1842, an act in which the states are required to be districted for the choice of representatives in Congress.

"In every case where a state is entitled to more than one representative, the number to which each state shall be entitled, under this apportionment, shall be elected by districts composed of contiguous territory, equal in number to the number of representatives to which said state may be entitled, no one district electing more than one representative." (Acts of 1842, chapter 47, section 2.)

The authority under which the legislature of this Commonwealth acts, in legislating upon the subject of electing representatives in Congress, is wholly derived from the clauses of the Constitution of the United States before cited, and from this act of Congress of 1842; and I am constrained to believe that no right or power has ever been granted to the legislature of a state to limit the freedom of the people in their choice of representatives by means of any such provision as that contained in the bill which I herewith return. I am convinced that this freedom is unlimited and irrestrainable, save by the Constitution of the United States itself.

Guided to this result by the light of authorities which command universal regard, I deem it more respectful to allow them to speak for themselves, by the adoption of their own language so far as reasonable limits of quotation will permit me to present them.

Mr. Justice Story, in his *Commentaries on the Constitution of the United States*, examined, in a thorough and vigorous discussion, the question "*Whether the state can superadd any qualifications to those prescribed by the Constitution of the United States.*"

Judge Story says: —

"If a state legislature has authority to pass laws to this effect, they may impose any other qualifications beyond those provided by the Constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the union. The legislature of one state may require that none but a Deist, a Catholic, a Protestant, a Calvinist, or a Universalist, shall be a representative. The legislature of another state may require that none shall be a representative but a planter, a farmer, a mechanic, or a manufacturer. It may exclude merchants, and divines, and physicians, and lawyers. Another legislature may require a high moneyed qualification, a freehold of great value, or personal estate of great amount. Another legislature may require that the party shall have been born, and always lived in the state or district; or that he shall be an inhabitant of a particular town or city, free of a corporation, or an eldest son. In short, there is no end to the variety of qualifications, which, without insisting upon extravagant cases, may be imagined. A state may with the sole object of dissolving the union, create qualifications so high and so singular, that it shall become impracticable to elect any representative." (Story on Const., Sect. 624.)

"It would seem but fair reasoning upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmative of these qualifications would seem to imply a negative of all others." (*Idem*, Sect. 625.)

The power attempted to be exercised by means of the clause of this bill now under consideration, has sometimes been thought to be justified by that article of amendment of the Constitution of the United States, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

But this suggestion is disposed of by Judge Story, in the following conclusive argument: —

* * * "The whole of this reasoning * * * proceeds upon a basis which is inapplicable to the case. In the first place no powers could be reserved to the states except those which existed in the states before the Constitution was adopted. The amendment does not profess, and, indeed, did not intend to confer on the states any new powers, but merely to reserve to them what were not conceded to the government of the union. Now, it may properly be asked, where did the states get the power to appoint representatives in the national government? Was it a power

that existed at all, before the Constitution was adopted? If derived from the Constitution, must it not be derived exactly under the qualifications established by the Constitution, and none others? If the Constitution has delegated no power to add new qualifications, how can they claim power by the mere adoption of that instrument which they did not before possess?" (Story on Constitution, Sect. 626.)

"The truth is, that the states can exercise no powers whatsoever which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by, the states. It is no original prerogative of state power, to appoint a representative, a senator, or president, for the union. Those officers owe their existence and functions to the united voice of the whole, not a portion of the people Before a state can assert the right, it must show that the Constitution has delegated and recognized it. No state can say that it has reserved what it never possessed." (*Idem*, Sect. 627.)

"Besides, independent of this, there is another fundamental objection to the reasoning. The whole scope of the argument is to show that the *legislature* of the state has a right to prescribe new qualifications. Now if the state in its political capacity had it, it would not follow that the legislature possessed it. That must depend upon the powers confided to the state legislature by its own constitution. A state, and the legislature of a state, are quite different political beings. Now it would be very desirable to know in which part of any state constitution this authority, exclusively of a national character, is found delegated to any state legislature. But this is not all. The amendment does not reserve the powers to the states exclusively, as political bodies; for the language of the amendment is, that the powers not delegated, etc., are reserved to the states, or to the *people*. To justify, then, the exercise of the power by a state, it is indispensable to show that it has not been reserved to the *people* of the state. The people of the state, by adopting the Constitution, have declared what their will is as to the qualifications for office. And here the maxim, if ever, must apply, *expressio unius est exclusio alterius*. It might further be urged that the Constitution, being the act of the whole people of the United States, formed and fashioned according to their own views, it is not to be assumed as the basis of any reasoning, that they have given any control over the functionaries created by it, to any state, beyond what is found in the text of the instrument. When such a control is asserted, it is matter of proof, not of assumption; it is matter to be established as of right, and not to be exercised by usurpation until it is displaced. The burden of proof is on the state, and not on the government of the union. The affirmative is to be established; the negative is not to be denied, and the denial taken for a concession." (*Idem*, Sect. 628.)

"In regard to the power of a state to prescribe the *qualification of inhabitancy or residence in a district*, as an additional qualification, there

is this forcible reason for denying it, that it is undertaking to act upon the very qualification prescribed by the Constitution as to inhabitancy in the state, and abridging its operation. It is precisely the same exercise of power on the part of the states as if they should prescribe that a representative should be forty years of age, and a citizen for ten years. In each case the very qualification fixed by the Constitution is completely evaded, and indirectly abolished." (*Idem*, Sect. 629.)

The subject did not escape the notice, also, of Chancellor Kent, in his *Commentaries on American Law*. He did not, however, indulge in any extended discussion, but in a single allusion emphatically declares his own opinion, and disposes of the topic.

"The question whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the Constitution of the United States, is examined in Mr. Justice Story's Commentaries on the Constitution. But the objections to the existence of any such power appear to me to be too palpable and weighty to admit of any discussion." (1 Kent's Com., p. 229, Note.)

The precise question we are considering arose in Congress in the year 1807. Under the clause of the 5th section of the 1st article of the Constitution, which provides that "Each house shall be the judge of the elections, returns and qualifications of its own members," the house of representatives was called to pass upon the validity of the election of William McCreery, of Maryland, who had been returned as a member, although wanting in the qualification of residence or inhabitancy required by the local law of Maryland. The case was investigated by very elaborate discussions, in long debate; and the right of Mr. McCreery to his seat, against the contestant, was determined by a vote of 89 to 18.

In this important debate, held now fifty-five years ago, I cannot forbear to mention that one eminent citizen participated as a representative from Massachusetts, who still remains to us, an interested, patriotic and patriarchal spectator of public affairs, in which for more than half a century he bore a part so conspicuous. I allude to Josiah Quincy, whose venerable age and illustrious character entitle the opinions he expressed, to be cited with the force of authority.

He insisted that "This was a right reserved to the people and not to the states. * * * He would not * * * enter into any inquiry on the question of expediency, because according to his view and clear conception of the Constitution, he could not consider an attempt made by a legislature of any state to annex qualifications, in any other light than as *a direct violation of the rights reserved to the people.*" (See Clark & Hall, Cong. Elections, p. 203.)

In recapitulating his argument Mr. Quincy contended: 1. That the right to be elected, was a right of the people which they had reserved to themselves, except as limited by the Constitution. 2. That they had not given to Congress the power to increase the number of qualifications, because it came within neither "time," "place," nor "manner." 3. That if the house should determine that the states had a power to annex these additional qualifications, they would sanction in the states an exercise of authority which could not be justified by the Constitution of the United States.

In the year 1856 the question arose in both houses of Congress, whether a state may by its own Constitution superadd qualifications for membership to those required by that of the union; and in each house, on full discussion, the rights of the sitting members were affirmed, notwithstanding that such members were ineligible to election under the constitution of Illinois where they were chosen. The cases were that of Judge Trumbull, elected by the legislature of Illinois to the senate of the United States, and chosen also by the people of one of the districts of Illinois to a seat in the other branch of Congress,— and that of Judge Marshall, elected representative by the people of another Illinois district. Judge Trumbull resigned his seat as a member of the house, preferring to assume the position of senator. The objection was urged both as to himself and Judge Marshall, that they were ineligible by reason of the following clause in the constitution of Illinois, viz.: "The judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit, in this state or the United States, during the term for which they were elected, nor for one year thereafter." The debate in the senate was led by Mr. Crittenden of Kentucky, who offered a resolution declaing that Mr. Trumbull was entitled to his seat. In the course of a very clear and discriminating speech in its support, Mr. Crittenden remarked: —

"It is now supposed, by those who contend that Mr. Trumbull is not entitled to his seat, that it is competent for a state, by its constitution, and I suppose they would equally contend, by any law which the legislature might from time to time pass, to superadd additional qualifications. The Constitution of the United States, they say, has only in part regulated the subject, and therefore it is no interference with that Constitution to make additional regulations. This, I think it will be plain to all, is a mere sophism, when you come to consider it. If it was a power within the regulation of, and proper to be regulated by the Constitution of the United States, and if that Constitution has qualified it, as I have stated, prescribing the age, prescribing the residence, pre-

scribing the citizenship, was there anything more intended? If so, the framers of the Constitution would have said so. The very enumeration of these qualifications excludes the idea that they intended any other qualifications. That is the plain rule of ordinary construction." (Cong. Globe, 34th Cong., Part 1, p. 547 *et seq.*)

Even such an extremist in the doctrines of state rights, as Mr. Mason of Virginia, said: —

"I do not see how it is possible to allow to the state legislatures (although perhaps I might have been better satisfied if it had been allowed to them) power to place any other qualifications or disqualifications than those imposed by the Constitution, without changing and impairing the grant of power vested by the Constitution of the United States in the legislature." (*Idem*, p. 579.)

The resolution of Mr. Crittenden was adopted in the senate, by a vote of 35 to 8, and in the similar case of contested election in the house, the result arrived at was similar, and not less decisive. And I may add that in at least two other cases involving the same principle, senators of the United States have held their seats without challenge or objection.

The conclusion to which, after anxious deliberation and research, my own mind is compelled, is that the clause in this bill attempting to confine the range of selection for a representative in Congress, to the district for which he may be chosen, would be a clear usurpation of a popular right.

Neither Congress, nor any state legislature, nor any other governmental agency, has any authority to control the people in their free right to select their members of Congress, restrained only by the limitations which they imposed upon themselves in the Federal Constitution.

The legislature in laying out the state into congressional districts, acts under a power conferred by the Federal Constitution; since all powers relating to the choice of officers created thereby, spring from that instrument. And the legislature can have no power in the premises which the people have not by the terms and meaning of the Federal Constitution, conferred upon it. The selectmen of the smallest town in the Commonwealth, in issuing their warrant notifying the people to come to the polls and give in their votes, have as much right to attempt to limit them in their range of selection, as has the whole government of the Commonwealth. This conclusion seems to me so clear that I cannot escape, nor evade it; and if I should affix my official signature to this bill, I should feel myself guilty, with my present

convictions, of seeking to usurp an ungranted power, and to affect a guardianship over the judgment and opinions of the people of the Commonwealth. Ours are representative governments, based on democratic ideas, their powers limited by written constitutions. Each of these elements must always be remembered, for they are all required to test our powers of government and the methods of administration. And what can be a more significant offence against democratic ideas than for the government to assume to govern and guide the popular choice, especially in the exercise of that most sovereign right, the elective franchise, by the assumption of undelegated power? This is a case, moreover, in which all the doubts, if there are any, must weigh against the power of the legislature, not in its favor. There are cases in which the doubts are to weigh in favor of a power. For example, for the purpose of redressing individual wrongs and grievances, asserting and vindicating rights, curing or preventing public or private injuries or evils, and punishing flagrant crimes, it is the part of a good magistrate to amplify his jurisdiction, because it is the office and design of government to secure right and justice, protect the weak and prevent wrongs. But this is not within that category. This is a case between the powers of the legislature on the one hand, and the powers of the people in their primary capacity, on the other. It is a question whether the people, in whom all the sovereignty of this government resides, have parted with their original, private, personal, individual, and imprescriptible right and power to choose whom they will to represent them in Congress, any further than they have done so by the specific limitations they imposed on themselves in the Federal Constitution. And until I see that the people have clearly imparted to the state government the power to restrain them, I cannot but regard any statute which affects to do so, as a usurpation of their undelegated powers and a violation of their sovereign rights.

As to the expediency of such a provision, were it competent for us to make it, I would not presume to review the judgment of the senate and house. Their wisdom would be my guide. But constrained by my own duty to obey the supreme law, and therefore, to examine in its unvarying light, every bill presented for signature, I cannot shelter myself behind even their great authority, if accused in my own conscience of transcending the proper powers of the Constitution.

It has been suggested, that if this bill is an usurpation of power in the particular questioned, then Massachusetts has for a long time had upon her statute-book a law open to the same objection. But the former inadvertent adoption of an unconstitutional

act of legislation cannot, surely, be pleaded as authority for its repetition. The former adoption of a statute is a fact not to be forgotten when considering the question of constitutionality, since there is a certain presumption, that what the legislature has heretofore done, has been done rightly; and I have given full weight to that presumption, in my own mind. But still it does not preponderate over the weight of great juridical authority, and over the solemn judgments of the houses of Congress, repeatedly rendered in the regular exercise of their distinct constitutional powers, and uncontrolled by the influences of party.

So, too, it has also been suggested that, if the criticism of the unconstitutionality of the clause in question is correct, then our members of Congress, elected for many years under just such an act, have been unconstitutionally chosen. This, however, is a sophism. Those who have been seated in the house of representatives from Massachusetts, have received the requisite votes of the people; and if the people have selected as members, persons inhabiting the districts for which they were chosen, the legal presumption is that the people did so because they chose to do so, not because an unconstitutional law so directed. In other words, their choice, and the direction of the law, were coincident in the particular cases. Even if it were true that, in any instance, the people thought they were bound by the law, and so followed it, when they would have preferred to have done otherwise, the election was, nevertheless, constitutional, because they apparently and professedly chose the candidate for whom they voted, being, in truth and in fact, free to have done otherwise, and duress is not to be presumed without proof.

It is urged further, that it is extremely undesirable that persons should be elected to Congress who do not reside among their constituents. That may be so. As a rule I think that it is so. But of the application of the rule, and of the exceptions to it, the people are the best judges; and they have reserved to themselves the right and the power to judge. How can we, then, presume to prejudge their judgment and impose on them our own? And I think that the people have rightly reserved to themselves that power; for the mere fact of legal domiciliation, in a given instance, does not always render one more familiar with the district in which his domicile is cast than with others.

For example, I cannot think that Daniel Webster was more familiar with the Plymouth district and its people, merely for the fact of his legal domicile in Marshfield, where he spent a few weeks of the year, than he was with the people and interests of the Boston district, where he had resided for years, and where

were the seat and centre of his political, social, and business life. Nor can I think that the transference of the town of Quincy from one district to another, rendered John Quincy Adams any more or less fitted to represent either the one or the other of them. Nor would it surprise me if the people of one of the new Boston districts should think a gentleman not unworthy to represent them, whose business pursuits, whose children's school, whose church, whose family and social ties and interests, are all within its borders, but who may customarily sleep and vote in some ward not included within the territory of such district. The necessary division of the city of Boston between two districts, affords a perfect test of the unsoundness of making an iron rule in the premises, and of the wisdom of the people in reserving the right to judge in the matter for themselves.

I have sought anxiously for some excuse which would justify me to myself in signing this bill. I have reflected that, after all, the provision of the clause in question, would be only a nullity; that any person elected to Congress, and having the constitutional qualifications, notwithstanding that he lacked the special qualification under this bill, would surely receive and retain his seat. But he would get it only by unseating another to whom the governor for the time being would have given the certificate, unless such governor should undertake to pass upon the constitutionality of the clause, and decide to render the certificate to the candidate who had received the larger number of votes, disregarding the question of domicile except in so far as it is prescribed by the Constitution of the United States.

And I cannot believe that I have the right to be instrumental in compelling the people to exercise their constitutional rights at the risk of a struggle for his seat by the representative of their choice, — nor that I ought to cast upon a future magistrate a burden which the Constitution in the clearest terms imposes upon myself.

NOTE. — Since the foregoing message was sent to the senate, my attention has been called to another early case in Congress, from Maryland, — that of WILLIAM PINKNEY, — of which I found no note in the "Annals of Congress," nor in Clark and Hall's cases of Contested Elections.

In Wheaton's Life of Pinkney, page 7, that author says: "In 1790 he [William Pinkney] was elected a member of Congress, and his election was contested upon the ground that he did not reside in the district for which he was chosen, as required by the law of the state. But he was declared duly elected, and returned accordingly, by the executive council, upon the principle that

the state legislature had no authority to require other qualifications than those enumerated in the Constitution of the United States; and that the power of regulating the times, places, and manner of holding the elections did not include that of superinducing the additional qualification of residence within the district for which the candidate was chosen. He made on the occasion what was considered a very powerful argument in support of his own claim to be returned; but declined on account of his professional pursuits and the state of his private affairs, to accept the honor which had been conferred upon him."

It may be interesting to add that I have also since been informed, by the learned author of the "*History of New England during the Stuart dynasty*," that during the colonial period of Massachusetts, persons were, in many cases, chosen deputies to the general court, who were not inhabitants of the towns by which they were returned. For example, Captain John Hull, the famous mint-master, who was from first to last a citizen of Boston, represented Westfield in 1674, Concord in 1676, and Salisbury in 1680.*

JOHN A. ANDREW.

[Upon the return of the bill, it was reconsidered by the senate and house, and two-thirds of each branch of the legislature, notwithstanding the objections of the governor, agreed to pass the same, so that it had the force of law, and became chapter 226 of the acts of 1862. In the act of 1872, chapter 300, dividing the Commonwealth into districts for the election of representatives in Congress, this restriction (being an inhabitant of the same district) was continued. Pub. Sts. ch. 9, § 1. But in the redistricting act of 1882, chapter 253, the restriction was omitted.]

* [NOTE BY THE EDITORS. Whenever the question has come before either house of Congress, it has been held, in accordance with the above opinion of Gov. Andrew, that a state cannot add to, or change the qualifications prescribed for representatives in Congress by the Constitution of the United States. *Turney* v. *Marshall* (House, 1856), 1 Bartlett Cong. Election Cases, 167; *Fouke* v. *Trumbull*, Ib.; *In re Trumbull* (Senate, 1856), Ib. 618. And residence in the district from which the representative is elected is not a qualification required by the Constitution of the United States, so that any law making it a qualification is unconstitutional. *Barney* v. *McCreery* (Senate, 1807), Clarke & Hall Cong. Elections Cases, 167. The question is ably and elaborately discussed by Hon. John Q. A. Brackett in an article upon "The Legal Qualifications of Representatives," published in 3 American Law Review, 410 (April, 1869), — in which he concurs in the opinion of Gov. Andrew.]

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